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A
TREATISE
ON
THE LAW OF SCOTLAND

RELATING TO
LAW AGENTS:
INCLUDING THE LAW OF COSTS AS BETWEEN
AGENT AND CLIENT:

WITH AN APPENDIX
OF RELATIVE STATUTES, ACTS OF SEDERUNT, AND ALL THE
TABLES OF FEES, &c.

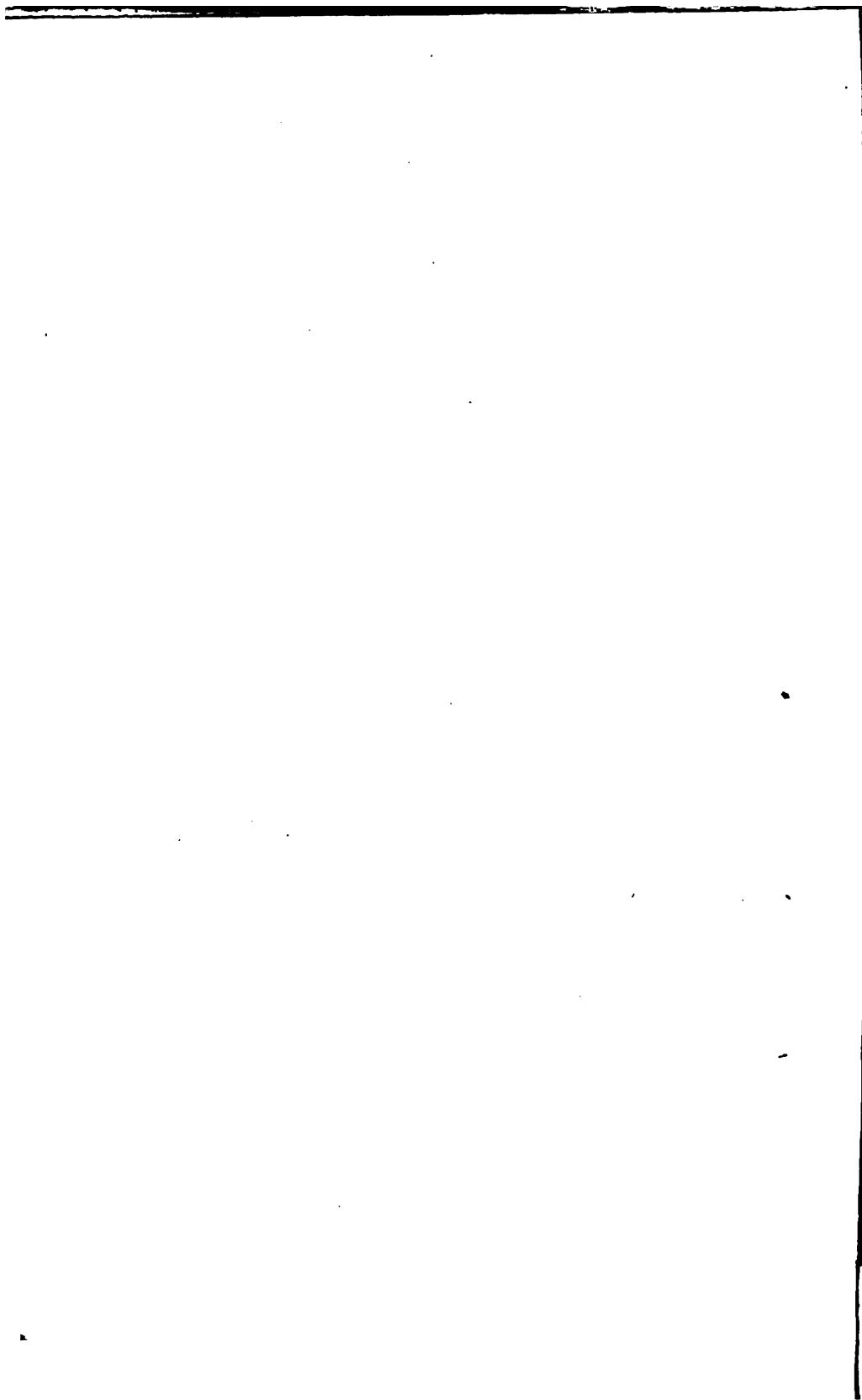
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TO
CHARLES MORTON, Esquire,
WRITER TO THE SIGNET,
CROWN AGENT FOR SCOTLAND,
THIS TREATISE
IS INSCRIBED,
BOTH AS A TRIBUTE TO HIS ACKNOWLEDGED EMINENCE
IN THE PROFESSION,
AND AS A TOKEN OF THE AUTHOR'S PERSONAL REGARD.



P R E F A C E.

It is scarcely necessary for me to say, in submitting this treatise to the consideration of the profession, that I have not undertaken to teach Law Agents their own business. My purpose has been merely to supplement the text books on court practice and conveyancing, by as concise an exposition as possible of the decisions and statutes which directly relate to legal practitioners in Scotland. A glance at the index of cases cited in this treatise will be sufficient to show that such decisions are extremely numerous; and I therefore venture to hope that, even to the most experienced members of the profession, this work may be of use, as the only attempt that has as yet been made to arrange systematically the cases bearing on this important branch of the law of Scotland.

The provisions of the Law Agents Act of 1873 have been embodied in the treatise, and considered in the light of the decisions of the English and Irish Courts under the corresponding sections of similar statutes.

The Act is also printed in the Appendix, with notes referring back to the pages where its various provisions are considered.

As many of our leading cases have been decided by the House of Lords on the analogy of the Law of England relating to Attorneys and Solicitors, I have thought it right to refer very frequently to the decisions of the English Courts. These decisions are, however, generally mentioned in the foot-notes; and, except in a few instances where the contrary is expressly stated, the text rests entirely on Scotch authorities. As an additional means of preventing any confusion of English with Scotch cases, the former are invariably printed in the foot-notes in italics, and the latter in ordinary type.

I gladly take this opportunity of tendering my most grateful acknowledgments to the many friends to whom I am indebted for advice and assistance. In particular, I have to thank Professor COSMO INNES for many valuable suggestions in regard to the historical part of the introduction; Mr W. G. SCOTT MONCRIEFF, Advocate, for the preparation of the Index and other opportune assistance while the work was passing through the press; and the Secretaries of the various Law Societies, for the information with which they have readily supplied me. To Mr A. ELLISON ROSS, S.S.C., late of the office of the Auditor of the Court of Session, I am under very great obligations. He has not only carefully revised the

entire work, most of it in manuscript as well as in print, but has also supplied me with much useful information in regard to such practical details as naturally fall within the exclusive province of Law Agents. His name is a sufficient guarantee for the accuracy of the part of the work which deals with the Law of Costs as between Agent and Client, as well as of the Tables of Fees, &c., printed in the Appendix.

In conclusion, I have merely to add, that while I am far from regarding the present treatise as an adequate exposition of the Law of Scotland relating to Law Agents, I trust that the profession will make allowance for the difficulties arising from the great variety of the subjects requiring to be dealt with. I cannot reasonably hope that the work will be found entirely free from inaccuracies; and I shall regard it as a personal favour if any of my readers will take the trouble to point out such errors or defects as he may discover.

J. H. B.

82 GREAT KING STREET,
EDINBURGH, *October 1873.*

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LIST OF ABBREVIATIONS.

- A. S., Act of Sederunt of the Court of Session.
- Bankton, Lord Bankton's Institute, by book, title,
and section.
- Bell's App., Bell's Appeal Cases.
- Bell's Com., Bell's Commentaries, 5th edition. (Where
Mr M'Laren's edition is referred to,
this is expressly stated.)
- Bell's Prin., Bell's Principles.
- Bligh, Bligh's Cases in the House of Lords.
- Br. Sup., Brown's Supplement to Morrison's Dic-
tionary of the Decisions of the Court
of Session.
- C., *Codex Juris Civilis.*
- D. (when not preceded }
by a numeral), . . } *Digesta Juris Civilis.*
- D., Dunlop's Court of Session Cases.
- Dow, Dow's Cases in the House of Lords.
- Elch., Elchies' Decisions, by the title and num-
ber of the decision.

Ersk.,	Erskine's Institute, by book, title, and section.
Ersk. Prin.,	Erskine's Principles, by book, title, and section.
F.,	Faculty Collection of Reports, octavo edition, from 1825 to 1841.
F. C.,	Faculty Collection of Reports, folio edition, from 1800 to 1825.
Fountainhall,	Lord Fountainhall's Decisions of the Court of Session.
H. L.,	House of Lords.
Hume,	Hume's Reports.
Hume (preceded by 1 or 2), }	Hume's Commentaries on Criminal Law, by volume and page of Bell's edition.
Jur.,	Scottish Jurist.
Just. Inst.,	<i>Justiniani Institutiones</i> .
M.,	Morrison's Dictionary of the Decisions of the Court of Session.
M'L. & Rob.,	M'Lean & Robinson's Appeal Cases.
Macph.,	Macpherson's Court of Session Cases, now current.
Macq.,	Macqueen's Cases in the House of Lords.
Mur.,	Murray's Reports of Jury Cases.
Pat. App.,	Paton's Cases in the House of Lords.
Robertson,	Robertson's Cases on Appeal from Scotland.
Rob. App.,	Robinson's Appeal Cases.
S.,	Shaw & Dunlop's Court of Session Cases.
S. (N. E.),	Do. New Edition of first five vols.
S. App.,	Shaw's Appeal Cases.

LIST OF ABBREVIATIONS.

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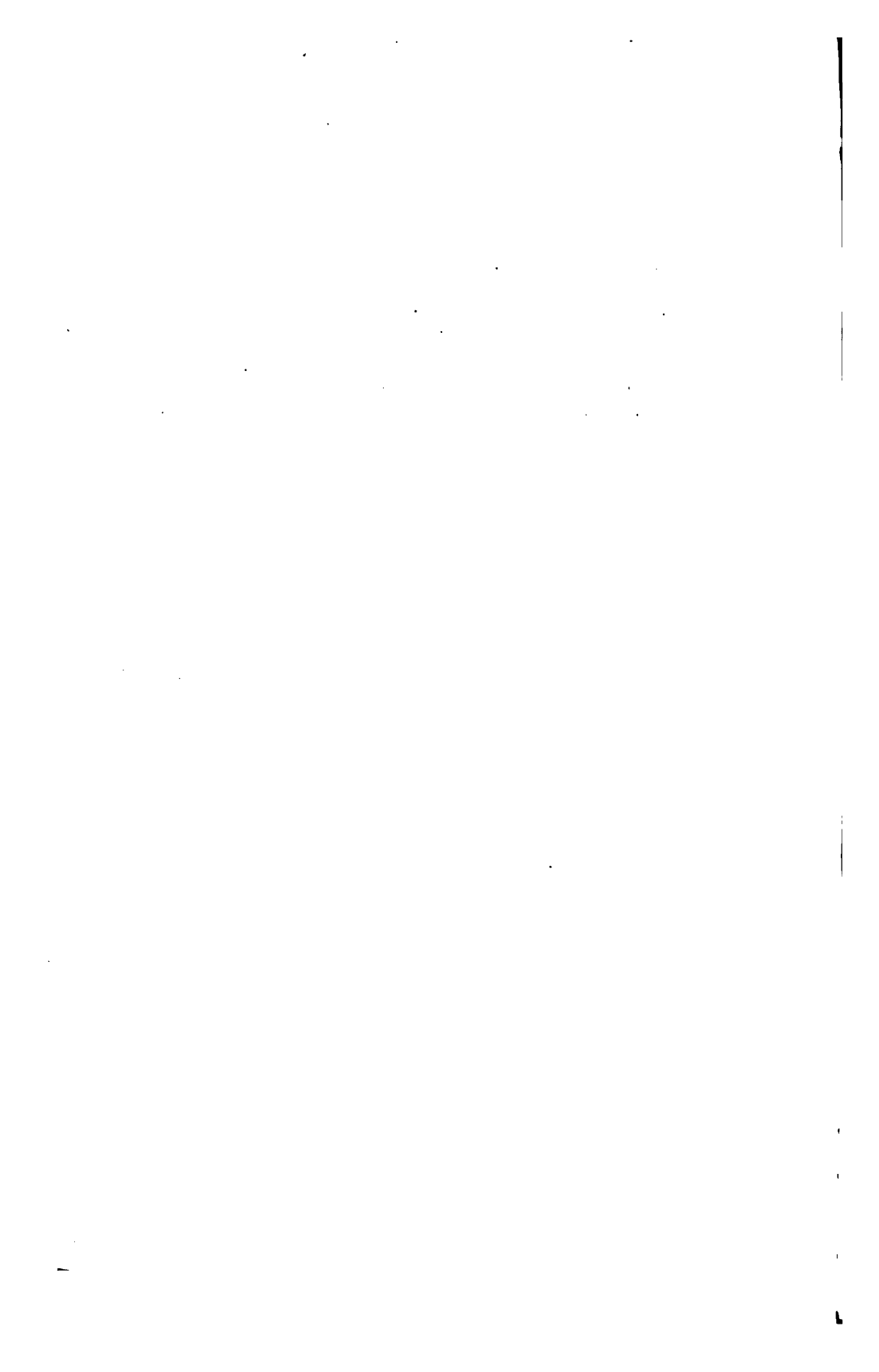
S. Just,	Shaw's Justiciary Cases.
S. & M'L,	Shaw & M'Lean's Appeal Cases.
Scot. Law Rep.,	Scottish Law Reporter.
Stair,	Viscount Stair's Institutions, by book, title, and section.
Stuart,	Stuart's Reports.
W. & S.,	Wilson & Shaw's Appeal Cases.

NOTE.

ENGLISH TREATISES AND REPORTS are invariably referred to without contraction or abbreviation.

ERRATUM.

The edition of Pulling's Law of Attorneys to which reference is made in this treatise is erroneously stated to be the fifth, instead of the *third and last*, published in 1862.



THE LAW OF SCOTLAND

RELATING TO

LAW AGENTS.

INTRODUCTION.

1. By the early laws or practice of most countries, litigants are obliged to appear in Court *in propria persona*, and to plead their own causes. But this primitive rule is gradually relaxed as the progress of society renders more and more apparent the inconvenience and injustice which result from its rigorous observance. The increasing complexity of the laws soon calls for special study, and leads eventually to the formation of a body of skilled practitioners, on whom the conduct of judicial proceedings is devolved. There has thus naturally arisen in every highly civilized community the important and honourable Profession of the Law, the members of which are generally divided, among the more advanced nations of modern times, into the two grades of Counsel, and Attorneys or Law Agents, the former conducting the pleadings and advising as to the general management of law-suits in at least the Supreme Courts, and the latter taking charge of the practical details of litigation, as well as rendering their assistance in matters in which a knowledge of law is required. (a)

Natural rise
of the legal
profession.

(a) The office of counsel is separate from that of attorney, not only in England, Scotland, and Ireland, but also in France, *Décret du 14 décembre*

Gradual development of legal profession in Rome.

2. The history of the Civil Law of Rome affords an excellent example of the natural rise and gradual development of the legal profession. Under the system of *legis actiones*, the maxim that no one could represent another in judicial proceedings admitted of scarcely any exception. But under the subsequent system of *formulae*, any party to an action was permitted to substitute a *cognitor*, by going before a magistrate and pronouncing certain words of style in presence of his opponent. In later times a *procurator* could be appointed by a simple mandate, but for a long time he could carry on the action only in his own name, as if he were the true *dominus litis*.(b) A *cognitor* or *procurator* was, however, merely a mandatory or representative, not a legal adviser or practitioner.(c) But after the publication of the Twelve Tables, there arose a body of men of the highest rank called *jurisconsulti* or *jurisprudentes*, who made a special study of legal principles and of the forms of judicial proceedings.(d) At first they merely assisted with their advice such of their friends and dependants (*clientes*) as consulted them; (e) but ultimately they taught publicly the science of law, and composed legal works.(f) From these *jurisconsulti* the forensic orators of Rome, who formed a separate class, received such legal instruction as they required in order to plead their clients' causes.(g) During the

1810, and *Ordonnance du 20 novembre 1822*; in some parts of Germany, *Holtzendorff's Rechtslexicon*, vol. i., p. 27; and in the Supreme Court of the United States, *Kent's Commentaries on American Law*, vol. i., p. 307 (10th ed., p. 343).

(b) *Gai Comm.* ii. 82 *et seq.*; *Just. Inst.* iv. 10; *Ortolan, Explication Historique des Instituts de Justinien*, ii. 598.

(c) *Bethmann-Hollweg, Der römische Civilprozess*, § 100; *Rudorff, Römische Rechtsgeschichte*, ii. 70.

(d) *D. i. 2. 2. 5*; *Gravina, de Ortu et Progressu Juris Civilis*, secta. 33 and 40.

(e) *Clientes*, from *cluere*, to hearken, meant originally a retainer or dependant. As to the relation of *patronus* and *clients*, see *Niebuhr's Roman History*, vol. i., chap. 21, and *Lectures 18 and 31* of *Schmitz's Translation*; and *Mommsen's History of Rome*, book i., chap. 6 (vol. i., p. 90 of *Dickson's Translation*).

(f) *D. i. 2. 2. 35-47*; *Demangeat, Cours de Droit Romain*, i. 73.

(g) *Cicero, de Oratore*, i. 45 and 59.

Republic their occupation was regarded as purely honorary; but they gradually became accustomed to receive gifts from their clients, till at last, under the early Empire, the occupation of an advocate came to be followed as a regular profession, and was placed under the superintendence and control of the magistrates. (h) The *jurisconsulti* continued, however, to exist as a distinct body till about the end of the third century, when the study of the law was undertaken by the advocates, who were for that reason then called also *jurisperiti* and *scholastici*. (i) The office of *cognitor* or *procurator*, which in the time of Cicero had become a regular, though apparently not a very respectable occupation, (k) still remained distinct from that of an advocate; but it was no longer adopted as a trade, the advocate who was to plead a cause being generally also appointed procurator in it. (l) There was thus never a separate class of practitioners in Rome properly corresponding to our law agents or attorneys. The terms *advocati*, *patroni*, and *causidici*, which occur in the compilations of Justinian, are synonymous, and refer to pleaders entrusted with the entire management of law-suits. (m)

3. The history of the law of England exhibits a similar natural progress. At first the actual presence of the parties to a suit was indispensable; but the rule was relaxed to the effect of allowing a party who had appeared personally at the commencement of judicial proceedings to be thereafter represented by a substitute. To enable one to appear in the first instance by attorney, a special license required to be obtained from either the Sovereign, Parliament, or Chancery. But as early as the reign of Edward I. the necessity of getting such special authority was entirely

Develop-
ment of legal
profession in
England.

(h) Mackenzie's *Studies in Roman Law*, 2d ed., p. 384; Bankton, iv. 3. 4; Verring's *Römisches Privatrecht*, i. 112; Holtzendorff's *Rechtswörterbuch*, i. 25.

(i) Bethmann-Hollweg, *Der römische Civilprozess*, § 143.

(k) Cicero, *pro Cæcina*, 5; Horace, *Sermonum*, lib. ii. 5. 34.

(l) Bethmann-Hollweg, *Der römische Civilprozess*, § 100.

(m) D. l. 13. 1. § 9-15; C. ii. 6. 6; Mackenzie's *Studies in Roman Law*, 2d ed., p. 381.

dispensed with in civil proceedings. The separation of the office of counsel from that of attorney can be traced back to the same reign.(n)

In Scotland
litigants
used for-
merly to
appear in
propria
persona.

4. The law of Scotland has passed through similar stages, but not *pari passu* with that of England. Till the close of the thirteenth century it was customary for the king to sit in person in his court of justice, and for litigants to appear, even in his court, *in propria persona*.(o) As early, however, as the reign of Alexander III. a party was permitted to appear in court by deputy.(p) It is stated in the *Regiam Majestatem* that the appointment of a *responsalis* or *procurator* could be made only in court;(q) and this procedure appears to have been occasionally adopted as late as the fifteenth century.(r) But as the *Regiam Majestatem* is now generally admitted to have been of English origin,(s) the statement that the appointment required to be made in court can scarcely be considered as authoritative in regard to the early law and practice of Scotland. In any case, towards the end of the fifteenth century the personal attendance of the parties to civil actions appears to have been imperative only when the proceedings might result in the defender being declared infamous.(t) The representative or substitute who was allowed to appear in the ordinary case is variously designated in our old statutes: sometimes

(n) 3 Blackstone's Commentaries, 25; Reeves' History of English Law (Finlayson's ed.), i. 217; Pulling's Law of Attorneys, 5th ed., p. 5; Oughton's Ordo Judiciorum, vol. i. tit. 48; 1 Stephen's Commentaries, 17.

(o) Robertson's Scotland under her Early Kings, i. 228, 257, 436, and ii. 46, 123; Cosmo Innes's Lectures on Scotch Legal Antiquities, p. 221. The same primitive practice appears to have prevailed in France till about the same date; Hallam's Middle Ages, chap. ii., part 2.

(p) Statuta Gildæ, cap. 20 and 35 (17 and 31 of Skene's version).

(q) Reg. Maj., iii. 13 (15 of Skene's version).

(r) Acta Auditorum, pp. 39, 47, 73, 152, 168, 174, 192, and 198; Acta Dominorum Concilii, pp. 214 and 229.

(s) Preface by Professor Cosmo Innes to Thomson's ed. of the Acts of Parliament of Scotland, p. 41; Reeves' History of English Law (Finlayson's ed.) i. 257.

(t) 1491, c. 35; Mackenzie's Observations on the Statutes, p. 106. See also Balfour's Practicks, p. 297.

he is called *prolocutor* or *forspekar*, (u) sometimes *advocate* (x) sometimes *procurator*, (y) and sometimes *actornatus* or *attorney*. (z) It is scarcely necessary to say that these terms were applied in those early times, not to professional lawyers, but to unlettered patrons, and other persons, who undertook *ex gratia* to conduct the causes of their dependants, friends, or neighbours. (a) The rules of procedure, moreover, assumed that the parties would generally attend personally; (b) and our statute-book contains many curious regulations, suited to a barbarous age, regarding the manner in which litigants must appear and conduct themselves in court. (c)

5. The rise of a separate legal class in Scotland seems to have been due to the introduction and development of the The clergy
the first
lawyers.

(u) 1318, cc. 17 and 18 (16 and 17 of Skene's version); 1320, c. 28 (27 of Skene's version); 1429, c. 125; 1455, c. 47; Balfour's Practicks, p. 279. See also *Regiam Majestatem*, i. 10 (11 of Skene's version); and *Quoniam Attachiamenta*, cap. 21 (35 of Skene's version); Cosmo Innes, *Sketches of Early Scotch History*, p. 214. Even after the institution of the Court of Session the term *prolocutor* was sometimes used as equivalent to advocate; 1587, c. 38; Bankton, iv. 3. 31.

(x) *Statuta Gildæ*, cap. 20 (17 of Skene's version); 1424, c. 45; 1429, cc. 116 and 125; 1487, c. 98.

(y) 1491, c. 30; 1503, cc. 78 and 82. See also *Regiam Majestatem*, iii. 13 (15 of Skene's version).

(z) 1425, c. 53; 1429, c. 130; *Acta Auditorum*, *supra*. See also *Regiam Majestatem*, iii. 13 (15 of Skene's version).

(a) Balfour's Practicks, p. 298; Robertson's *Scotland under her Early Kings*, ii. 134. Even after the institution of the Court of Session, recourse does not appear to have been invariably had to professional lawyers; for the report of a case decided in 1610 bears that an eldest son, compearing in his father's cause, and proposing allegiances, will be reputed his father's procurator; *Wedderburn v. Nisbet*, 10 July 1610, *M.* 7,326 and 12,247. See also a similar decision in the case of *Laird of Eist Nisbit v. L. Inverleith*, 23d July 1553, referred to in Balfour's Practicks, p. 298.

(b) Balfour's Practicks, p. 289-297.

(c) 1457, cc. 82 and 104; 1555, c. 41; 1584, cc. 138 and 140; 1594, c. 219; Balfour's Practicks, p. 279. As to forms of process in still earlier times, see Cosmo Innes's *Lectures on Scotch Legal Antiquities*, p. 234; *Sketches of Early Scotch History*, p. 151; and *Scotland in the Middle Ages*, p. 180.

Civil and Canon Laws.(d) As the clergy were the only body of men capable of reading and explaining the Latin compilations of these laws, their advice and assistance were naturally sought by litigants; and they accordingly appear to have gradually assumed the character of advocates in the ecclesiastical courts.(e) Moreover, these courts, in which the greatest part of the judicial business of Scotland was carried on before the institution of the Court of Session, were presided over by churchmen who had applied themselves to the study of law;(f) and the notaries public, who probably acted to a large extent as men of business or legal advisers, were all churchmen, or dependants of churchmen.(g) But the Canon Law prohibited a clergyman, even in the lesser orders, from appearing as an advocate in a temporal court, except in his own cause or that of his church, or in the causes of persons in destitute circumstances.(h)

Establishment of a separate profession.

6. The following well-known statute of James I. contributed, doubtless, to the ultimate establishment of the legal profession:—"Ande gif thar be ony pure creature that for defalt of cunnyng or dispenses can not or may not folow his cause, the king for the lufe of God sall ordain that the Juge before quham the cause suld be determyt purvay and get a lele and a wyse advocate to folow sic pure creatures cause. And gif sic cause be obtenyt the wranger sall assyth bath the party scathit and the advocatis costes and travale."(i) This statute was followed by several others,

(d) Robertson's Scotland under her early Kings, vol. ii., p. 134.

(e) Professor Cosmo Innes's Lectures on Scotch Legal Antiquities, pp. 212 and 239. See also Henryson's Poems, Laing's ed., p. 148 (Taill of the Dog, the Scheip, and the Wolf), and Stephen's Commentaries on the Law of England, p. 16.

(f) Sketches of Early Scotch History, by Cosmo Innes, p. 263. As to the consistorial jurisdiction of the church courts, see *Statuta Ecclesiae Scoticanæ*, vol. i., p. 174.

(g) Professor Cosmo Innes's Lectures on Scotch Legal Antiquities, p. 239. See also *Statuta Ecclesiae Scoticanæ*, vol. ii., p. 112.

(h) Decret. Greg. ix., lib. i., tit. 37; *Inst. Juris Canonici*, iii. 2. 14; Ayliffe's *Parergon Juris Canonici Anglicani*, p. 57. See also Balfour's *Practicks*, p. 298.

(i) 1424, c. 45.

which enacted that the losing party should pay the winner's expenses.^(k) But, apparently, these expenses were merely payments to witnesses, and similar disbursements, for no mention is made of fees to procurators or advocates either in the *Acta Auditorum Causarum et Querelarum*, which contain a full record of the proceedings of the Judicial Committee of Parliament from 1466 to 1494, or in the *Acta Dominorum Concilii*, which contain a similar record of lawsuits determined by the King's Council from 1478 to 1495. Moreover, the popular literature of the period, while denouncing "the law's delay" and the corruption of justice, contains no reference to that favourite subject of satire and invective—lawyers' charges.^(l) We may therefore infer that, although remuneration may have been occasionally promised and given for legal advice and assistance,^(m) there did not exist any recognised class of professional practitioners in our courts of law prior to the institution of the present Court of Session in 1532, when ten advocates were appointed, but only eight could be got, "to procure for everie man for thair waigis, bot giff thai have ressonable excuss."⁽ⁿ⁾

(k) 1425, c. 65; 1449, c. 20; 1471, c. 49; 1487, c. 105. See also *Quoniam Attachiamenta*, cap. 4; and Balfour's *Practicks*, p. 299.

(l) Henryson's *Poems*, Laing's ed., pp. 148 and 214 (his "Taill of the Dog, the Scheip, and the Wolf," will be found also in the appendix to Professor Cosmo Innes's *Lectures on Scotch Legal Antiquities*). Dunbar's "Tidings fra the Session," printed in Lord Hailes's *Ancient Scottish Poems*, p. 40. (The Session referred to is not the existing Court of Session instituted by James V., but the prior Court of the same name; see *Ersk.*, i. 3. 10. Two stanzas of modern origin were added to the poem in a previous publication; see Hailes's *Ancient Scottish Poems*, p. 249), Lyndsay's "Carman's Account of a Lawsuit." The two latter poems are printed in Chambers's *Cyclopædia of English Literature*, vol. i., pp. 52 and 55.

(m) In a case which was decided four months before the institution of the present Court of Session, it was held that "ane advocate or procuratour has gude actioun and titill to call and persew for all sowmes of money or uther gude deid promisit to him be ony persoun, in name of pensaioun for counsall and advocatioun in his actiounis and causis, quhen he sall be requirit thairto;" *Scrymgeour v. Cuming*, 30th Jan. 1532, referred to in Balfour's *Practicks*, p. 300. See also Balfour's *Practicks*, p. 299.

(n) 1532, c. 64 (erroneously printed 1537 in the small edition of the

Advocates
at first acted
as agents.

7. These advocates were originally called General Procurators of the Council, (o) and for more than a century and a-half they and their successors practised in the double capacity of counsel and attorney. (p) None but advocates and their "servants" were permitted to borrow processes from the clerks of court, (q) a regulation which was strictly enforced at the beginning of last century, (r) and was not entirely abolished till 1820. (s)

Gradual formation of a separate class of law-agents.

8. The inconveniences necessarily arising from the employment of the same person as advocate and attorney soon called for a sub-division of labour, and led to the gradual formation of three classes of attorneys or law agents, viz., Advocates' First Clerks, Writers to the Signet, and Solicitors.

Advocates' First Clerks.

9. The Advocates' First Clerks were originally merely the head "servants" or assistants of the advocates, but among them were frequently to be found young men studying for the bar. (t) Entrusted with the practical details of their masters' causes, and early recognised as members of the

Statutes). The statement in the text is supported by the opinion of Lord Bankton in his *Institute of the Laws of Scotland* (iv. 3. 6.), published in 1752. More recent authors seem to have been misled by the use of the term advocate in the old statute 1424, c. 45; Shand's *Practice*, p. 73; Chambers's *Encyclopædia*, *vocæ* Advocates.

(o) A. S. 27 May 1532. Hence, even at the present day counsel are generally referred to in the acts and decrees of the Court of Session as the parties' procurators. Both before and after the institution of that Court, advocate and procurator were generally employed as synonymous terms; 1487, c. 91; Habbakuk Bisset's MS. *Rollment of Courtis*, folio 98, in the Advocates' Library; Balfour's *Practicks*, p. 299; Instructions to the Commissaries of Edinburgh in 1563, p. 655 of Balfour's *Practicks*; Instructions to the Commissaries, &c., 1666, Tait's A. S. p. 95; Bankton, iv. 3. 31. And the practitioners in the sheriff-court of Aberdeen still retain their old appellation of advocates.

(p) Shand's *Practice of the Court of Session*, p. 76, and Acts of Sederunt referred to *infra*.

(q) A. S. 11 Jan. 1604; A. S. 29 Jan. 1642; A. S. 21 Nov. 1649; A. S. 28 Feb. 1662; A. S. 26 Feb. 1678; 1672, c. 16.

(r) A. S. 31 July 1717.

(s) A. S. 11 March 1820.

(t) A. S. 17 Nov. 1610; A. S. 28 Feb. 1662; Shand's *Practice*, p. 98.

College of Justice,^(u) they naturally took advantage of their position in order to act as agents in their own right, a practice which the Court seems to have at first tacitly permitted,^(x) and eventually recognised.^(y) They thus came to form a society, admission into which could be obtained only by following a prescribed course of legal study and practice.^(z) This body has, however, ceased to exist as a separate class of practitioners, its members having been united since 1850 with the Incorporated Society of Solicitors in the Supreme Courts.^(a)

10. The origin of the Society of Clerks to the Signet, now Writers to
the Signet. generally called Writers to the Signet, is not quite certain, but they appear to have been at one time clerks in the office of the Secretary of State, who had charge of the King's seal.^(b) In the Act of Parliament which established the Court of Session they were mentioned as a previously existing body;^(c) and they were early recognised as members of the College of Justice.^(d) The institution of the Court of Session must, however, have added considerably to their importance, as summonses and other writs passing the Signet were then substituted for brieves from Chancery,^(e) and these new writs required to be prepared, and eventually came to be signed, by Writers to the Signet.^(f) Being thus

(u) A. S. 29 July 1637; A. S. 26 Feb. 1687 (Tait's Acts of Sederunt, p. 176).

(x) A. S. 30 Nov. 1692; 1672, c. 16, § 31.

(y) A. S. 10 Aug. 1754.

(z) Shand's Practice, p. 98.

(a) A. S. 4 Dec. 1850.

(b) A. S. 31 Dec. 1590; Bankton, iv. 4. 11; Solicitors in the Supreme Courts v. Clerks to the Signet, 25 Feb. 1800, 12 F.C. 372, M. voce College of Justice, Appx. No. 1; aff. 7 April 1802, 4 Pat. 326.

(c) 1532, cc. 59 and 60, where reference is made to their fees as settled in the reign of James IV.; A. S. 27 May 1532.

(d) A. S. 29 July 1637; 1661, c. 23; A. S. 23 Feb. 1687, Balfour's Practicks, p. 270.

(e) Stair, iv. 3. 4.

(f) Solicitors v. Clerks to the Signet, *supra*. By A. S. 31 Dec. 1590, it was declared that writs passing the Signet must be signed by the secretary or his deputies, the keepers of the Signet.

officially engaged at the initial stage of litigation, the members of the society might naturally have been expected to act as agents in the Court of Session. They were, however, for a long time prohibited from doing so, by the injunction of the Secretary of State in 1594, by various Acts of Sederunt to be subsequently referred to, and by their own resolutions as late as 1696.^(g) But these prohibitions seem to have become obsolete at the beginning of last century,^(h) and the right of members of the Society to practise as agents in the conduct of litigation was expressly recognised by the Court in 1754.⁽ⁱ⁾ Since then, the Writers to the Signet have formed the principal and most numerous body of legal practitioners in Scotland, and held the highest rank in the profession. This honourable position has been chiefly due to the very great attention which they have always paid to the education of their apprentices, both in scholarship and in law, and also to some extent to the high fees exigible on admission.

Solicitors in
the Supreme
Courts.

11. The origin and history of the Society of Solicitors in the Supreme Courts are somewhat curious. The earliest reference to a class of agents distinct from advocates and their clerks is to be found in an Act of Sederunt, dated 13th July 1596, directed against "inopportune sollisteris," which, after narrating that the Lords were continually vexed with the importunities of parties, their advocates and agents, provides that "in caice ony advocat, clerk to the signet, agent, or their servandis, sollist as said is, it sall be ane sufficient caus of deprivation and debarring of thame fra the tolbuthe," in which the sittings of the court were then held. It may be inferred from this Act of Sederunt that a class of agents, distinct from advocates and their clerks, had established themselves, and been allowed to practise, very soon after the institution of the Court of Session. But the Faculty of Advocates regarded the introduction of these agents as an abuse, and they had sufficient influence to

(g) *Solicitors v. Clerks to the Signet, supra.*

(h) A. S. 10 Feb. 1710; A. S. 14 June 1738.

(i) A. S. 10 Aug. 1754.

obtain various Acts of Sederunt to prevent them practising in court. The first of these was passed on 10th January 1604, and it declares "that na maisser sall grant ony accesse to sic persones as are called agentis w^t ony of the barris, outwarde or inwarde, and that the said agentis sall be secluded and debarred thairfra, and fra all immunities and privileges whatsoever."^(k) In 1610 another Act of Sederunt was passed, prohibiting "persones, such as agents who are unprofitable," from repairing to the place in court appointed for the advocates, and giving strict injunctions to the macers "that they suffer no persons to have entry within the utter bar, but speciallie men with spurs and agents, against whom there is many good acts and statutes made of before."^(l) This exclusion of agents seems, however, to have been of short duration; for in 1649 agents were again referred to in Acts of Sederunt as practising in court.^(m) But in 1672 a Statute was passed which provided, "in respect several persons, being neither advocates nor advocates' servants, do take upon them under the name of agents to meddle and negotiat in processes, who are found to be of no use but burdensome to the lieges; that hereafter all the agents be debarred the house, and not permitted to negotiat or manage processes; and recommends to the Lords of Session to see the same punctually observed."⁽ⁿ⁾ Even this enactment appears to have proved inoperative; for in 1678 complaint was again made of "some persones attending the house, and pretending to negotiate in and manage processes who are neither advocats nor servants to advocats;"^(o) and in 1685 reference was made to "the crowd of agents."^(p) Towards the end of the seventeenth century these agents

(k) Habbakuk Bisset's MS. Rolment of Courtis, folio 95, in the Advocates' Library. The other Acts of Sederunt referred to in the text will be found in the printed collections.

(l) A. S. 17 Nov. 1610. The advocates probably objected to spurs as likely to tear their gowns.

(m) A. S. 8 and 21 Nov. 1649.

(n) 1672, c. 16, § 31.

(o) A. S. 26 Feb. 1678.

(p) A. S. 3 Feb. 1685.

seem to have been tolerated,(q) and during the succeeding fifty years their occupation was gradually recognised by the court.(r) At length the office of agent or solicitor was legalised by Act of Sederunt, dated 10th August 1754, which recognised the right of Advocates' First Clerks and Clerks to the Signet to practise before the court, and directed all the other existing agents to enrol themselves on or before the 1st of February 1755. By this and subsequent Acts of Sederunt regulations were made for the examination and admission of future candidates.(s) In 1797 a charter was obtained from the Crown,(t) erecting and incorporating the thirty-seven solicitors then existing, and all subsequent members of the society, into a corporation by the name and title of "The Society of Solicitors in the Court of Session, Commission of Teinds, and High Court of Justiciary in Scotland." This charter was confirmed and amended by a private Act of Parliament, passed on 13th July 1871, which, *inter alia*, regulated the qualifications of candidates for admission, and re-incorporated the society under the name of "The Society of Solicitors in the Supreme Courts of Scotland." (u) Of recent years a very high standard of education, both in general knowledge and in law, has been required by the society from applicants for admission. In conducting litigation, members of the society have always enjoyed the same privileges as Writers to the Signet, except as regards the preparation of writs passing the Signet; and there are in Edinburgh few legal firms in which at least one of the partners is not a solicitor. Indeed, the greater part of the

(q) A. S. 30 Nov. 1692; Cuthbert v. Ross, 1 July 1697, 1 Fountainhall's Decisions, 781. In 1696 David French, agent, having used unbecoming expressions against the Lords, was imprisoned and fined 1000 merks, subsequently restricted to 500 merks; MS. Extracts from the MSS. of Lord Fountainhall, p. 329, in the Advocates' Library.

(r) A. S. 10 Feb. 1710; A. S. 1 July 1729; A. S. 15 June 1738; A. S. 23 Feb. 1739; A. S. 20 Nov. 1740; A. S. 15 Jan. 1741; A. S. 6 July 1748; Bankton, iv. 3. 25, and iv. 4. 11.

(s) A. S. 11 Mar. 1772; A. S. 4 Dec. 1850.

(t) Printed among the Acts of Sederunt, under date 8th March 1809.

(u) 34 and 35 Vict. c. 107 (Local). See Appendix.

litigation in the Court of Session has hitherto been conducted by members of the society.

12. In consequence of the introduction of a separate class of practitioners in the Court of Session, advocates now practise merely as counsel,^(v) and it is not customary for clients to resort to them in the first instance for legal advice or assistance. Professional etiquette forbids counsel drawing any pleadings, or appearing in any court, except on the instructions of an agent entitled to practise in such court. There is, however, no rule against their holding consultations with clients, giving opinions, and drawing papers, other than pleadings, without the intervention of any agent; and a country agent may prepare and lay before counsel a memorial for opinion, without the intervention of an Edinburgh agent.^(x)

Advocates
now practise
merely as
counsel.

13. While the position of practitioners in the Supreme Courts was thus materially altered in the course of the last three centuries, there was no corresponding change among the practitioners in the inferior courts, who were generally called writers or procurators. The constitution of these courts having been originally modelled on the Court of Session,^(y) the agents who practised before them were simply "advocates of a lower rank,"^(z) having the entire manage-

Practition-
ers in Infe-
rior Courts.

^(v) They have the privilege of pleading and practising in all the Courts of Scotland, and likewise in the House of Lords. But they seldom plead before the inferior courts, except in important cases, or upon extraordinary occasions. Bankton, iv. 3. 7.

^(x) Journal of Jurisprudence, vol. xiv., pp. 148 and 206.

^(y) 1540, c. 72.

^(z) Bankton, iv. 3. 30. At the end of the sixteenth century it seems to have been necessary for those who desired to be admitted to practise as advocates in the Court of Session to pass a probationary period of three years as procurators before the inferior Judges, and to get from them a certificate of their qualifications.—(A. S. 8 Aug. 1588, and 14 Aug. 1590, referred to in "The Forme of Processe before the Lordis," printed in Skene's English version of the *Regiam Majestatem*, folio 112; and also in Habbakuk Bisset's M.S. Rolment of Courtis, folio 98, in the Advocates' Library.) But this regulation was soon superseded by the qualifications prescribed by the Faculty of Advocates, and sanctioned by the Court on 17th Nov. 1610.

ment of their causes, but excluded from practising in the Supreme Courts, and entitled to plead only before the particular inferior courts into which they had been admitted ;(a) and such was substantially the position which they occupied till the passing of the Law Agents (Scotland) Act in 1873. They have always been subject to the superintendence and control, not only of the inferior Judges before whom they practise,(b) but also of the Court of Session, both at common law and by virtue of various statutes.(c) Till 1825, however, there were no general regulations in regard to the qualifications for admission, except that candidates must subscribe the oaths,(d) and take out annually certificates or licenses to practise.(e) But in several of the more important sheriff-courts, viz., Aberdeen, Glasgow, Edinburgh, and Paisley, the agents or procurators soon formed themselves into local societies, the members of which had the exclusive privilege of practising in them ; and these societies prescribed separate regulations as to the qualifications, examination, and admission of candidates—an apprenticeship to a member being generally a *sine qua non*.

Advocates
in Aber-
deen.

14. The origin of the Society of Advocates in Aberdeen (f) cannot now be precisely ascertained, as almost all their records are said to have perished in a fire which broke out in the

(a) Bankton, iv. 3. 30.

(b) *Graham v. Lang*, 20 Feb. 1850, 12 D. 754 ; *Ritchie v. Macrosty*, 14 Feb. 1854, 16 D. 554 ; *Hamilton v. Anderson*, 11 June 1856, 18 D. 1003, affirmed 18 June 1858, 20 D. (H.L.) 16, and 3 Macq. 16 ; 28 and 29 Vict. c. 85, § 24.

(c) A. S. 23 Feb. 1763 ; A. S. 6 March 1783 ; A. S. 4 Feb. 1786 ; 6 Geo. IV. c. 23 ; 16 and 17 Vict. c. 80, § 49 ; 21 and 22 Vict. c. 56, § 18 ; *Colquhoun v. Paterson*, 8 March 1850, 12 D. 851 ; A. S. 1 March 1861 ; 28 and 29 Vict. c. 85, § 24.

(d) 20 Geo. II. c. 43, § 44.

(e) 25 Geo. III. c. 80 ; 37 Geo. III. c. 90 ; 39 and 40 Geo. III. c. 72.

(f) They are the only class of provincial practitioners styling themselves advocates. They appear to have been originally called procurators and advocates (the terms, as we have already seen, having been used as synonymous in early times) ; but the former designation was soon discontinued, and only the latter was employed in the charters of incorporation obtained by the society.

office of the Commissary Clerk of Aberdeen in October 1721. It appears, however, that on 2d October 1633 the Sheriff of Aberdeen passed an Act of Court recognising sixteen procurators as qualified to conduct judicial proceedings, and prohibiting all other persons from practising before him.(g) The procurators thus admitted seem to have held that they were entitled to control the examination and admission of all future candidates ;(h) and it came to be regarded as indispensably necessary for every applicant for admission to obtain the concurrence of the society before presenting an application to the sheriff for a remit for examination. In 1685 the members then practising formed themselves into a regular society, under the patronage of James Scougal, Commissary of the Diocese of Aberdeen (afterwards one of the Judges of the Court of Session, under the title of Lord Whitehill) for the purpose of providing a fund for the support of decayed members and of the widows and children of members. On 27th January 1774 the society obtained a royal charter of incorporation, which *inter alia* confirmed all their former rights and privileges. Two other charters were subsequently obtained in more ample and comprehensive terms, the one on 20th February 1799, and the other on 18th May 1862. In virtue of these charters, and of immemorial usage, the members of the society were entitled to the exclusive privilege of acting as procurators in all the courts within the city of Aberdeen ; but they were held not entitled to prevent others from being admitted or practising in the sheriff-court at Peterhead.(i) A very high standard of qualification has always been required by the society from its apprentices.

(g) This statement, and most of the following, rest on the authority of a short historical account of the society which was printed in the early volumes of the Scottish Law List.

(h) Thus it appears from the earliest recorded acts of admission that, on 7th October 1656, a petition was presented by Andrew Thomson, "nottar-publick in Aberdeen, to the sheriff-principal and his deputs, praying his lordship, *with the advice and consent of the procurators* of his judicatory, to admit the petitioner to be an ordinary procurator before the *samen judicatory*." See the session papers in the case of Gray v. Advocates of Aberdeen, 6 March 1841, 3 D. 813.

(i) Gray v. Advocates of Aberdeen, 6 March 1841, 3 D. 813.

Faculty of
Procurators
of Glasgow.

15. The origin of the Faculty of Procurators of Glasgow can be traced back to the old ecclesiastical courts.^(k) As early as 1668, the procurators in the Commissary Courts of Glasgow, Hamilton, and Campsie, seem to have formed a society or faculty, and to have exercised several of the powers of a corporate body. By uniform usage they were allowed to practise in all the other courts of Glasgow, including the modern sheriff-court, established in 1748. They appear to have gradually assumed the privilege of examining and admitting practitioners in these courts, and of excluding from practice all but the sons or apprentices of members. On 6th June 1796 the Faculty obtained a royal charter of incorporation, confirming their exclusive privileges, prescribing the qualifications and mode of admission of candidates, and conferring on the incorporated body power to enact bye-laws. The Faculty more than once successfully resisted the admission as procurators in the sheriff-court of Glasgow of parties, otherwise qualified, who were not members of their body.^(l) In 1833 a private Act of Parliament was obtained, which, *inter alia*, authorised the Faculty to admit persons who had not served an apprenticeship to a member, upon payment of such reasonable fees as the Faculty should fix from time to time.^(m) The fees payable by strangers thus admitted were, however, somewhat higher than those payable by apprentices.⁽ⁿ⁾ The rules laid down by the Faculty from time to time, in regard to the qualifica-

(k) The earliest extant record of their transactions is contained in a Sederunt Book in the possession of the Faculty. The first entry is dated 12th November 1668, but a part of the volume, at the beginning, appears to have been lost. It may be here mentioned that the Faculty possessed the ancient court room and record room in Glasgow Cathedral, and that members were exempted by the municipal authorities from watching and warding within the burgh, and from having soldiers billeted upon them.—See the session papers in the case of the Faculty of Procurators of Glasgow *v.* Douglas & Hill, 20 Dec. 1851, 14 D. 280.

(l) *Dinning v. Faculty of Procurators of Glasgow*, 27 May 1817, Hume 166, and 14 D. 282, *note*; *Faculty of Procurators of Glasgow v. Douglas & Hill*, 20 Dec. 1851, 14 D. 280.

(m) 3 and 4 Will. IV. c. 64, § 15.

(n) Alterations on Bye-Laws adopted on 9th September 1868.

tions and examination of candidates for admission, have been well calculated to secure a highly educated and efficient class of legal practitioners.

16. Somewhat similar are the origin and history of the Solicitors-at-Law,^(o) who practised in the inferior courts at Edinburgh. On 27th January 1707 the procurators before the Commissary Court of Edinburgh, amounting in number to twenty-two, formed themselves into an association for the purpose of providing a fund for their widows and children, and making regulations as to the admission of candidates. The authority of the Commissaries of Edinburgh was interponed to these regulations, one of which required an apprenticeship to a member. These procurators soon came to practise in the Sheriff and Burgh Courts of Edinburgh, apparently to the exclusion of all other agents. On 6th March 1765 they obtained from the magistrates of Edinburgh a seal of cause,^(p) conferring on them and their successors the exclusive privilege of practising in the Burgh Courts; and on 16th May 1765 the Sheriff-Substitute of Edinburgh passed an Act of Sederunt, rendering it necessary for candidates to serve an apprenticeship to a member before being admitted to practise in the Sheriff-Court. These privileges and regulations were confirmed by a royal charter of incorporation, which was granted on 12th April 1780, without prejudice to the privileges of the Faculty of Advocates.^(q) On the transference of the jurisdiction of the Consistorial Court of Edinburgh to the Court of Session in 1830, the existing members of the society were empowered, during their respective lives, to conduct as agents before the Court of Session such causes or proceedings as were previously appropriated to the Commissary Court.^(r) The Solicitors-at-Law had the exclusive privilege of practising in the inferior

(o) Generally contracted to S.L.

(p) All the trades had formerly seals of cause from the magistrates, regulating their privileges. *Sigillum causarum* was the seal appointed for such charters in the old Courts of the Bishops, as well as of the Burghs.

(q) See the session papers in the case of *M'Andrew and Others v. Solicitors of Edinburgh*, 28 June 1833, 11 S. 806.

(r) 1 Will. IV. c. 69, § 39.

courts held in the city of Edinburgh, viz., the Sheriff and Commissary Court, the Burgh Court, and the Dean of Guild Court. This privilege was successfully maintained against parties who were not apprenticed to members,^(s) but it was held not to extend to the Sheriff-Court held at Leith.^(t)

Writers in
Paisley.

17. At the close of last century the members of the Sheriff-Court of Renfrewshire were united into a society, known by the name of the Society of Writers in Paisley, under certain rules established by themselves, for the purpose of managing their affairs and raising a fund for the support of their poor and decayed members, and of their widows and children. On 18th February 1803 they obtained a royal charter incorporating them under the name of the Faculty of Procurators in Paisley, and confirming the exclusive privilege which they had previously enjoyed of practising in the Sheriff-Court of Renfrewshire, Burgh Court of Paisley, and all other Courts held within the town of Paisley.

Qualifica-
tions of pro-
curators not
members of
chartered
societies.

18. In order to secure a uniform system of legal training for intending procurators in the inferior courts other than those above mentioned, the Court of Session passed an Act of Sederunt on 12th November 1825, which provided, "without prejudice to the legal rights of chartered bodies," that no one should be admitted as a procurator unless he had served three years as an apprentice to a writer to the signet, a solicitor, or a procurator.^(u) This regulation, which was substantially repeated in 1839,^(x) was, however, sometimes relaxed in very special circumstances.^(y) On the conclusion of their apprenticeship, and before they were admitted to practise, candidates were generally remitted by the sheriff to a procurator in his court, in order to undergo

^(s) *M'Andrew and Others v. Solicitors of Edinburgh*, 28 June 1833, 11 S. 806.

^(t) *Solicitors of Edinburgh v. Smillie and Others*, 4 Dec. 1828, 7 S. 134, affirmed 24 Nov. 1830, 4 W and S. 370.

^(u) A. S. 12 Nov. 1825, part ii., chap. 4; and A. S. of the same date, as to the burgh courts, part ii., chap. 6.

^(x) A. S. 10 July 1839, § 157.

^(y) *Forbes v. Robertson*, 13 Jan. 1835, 13 S. 244; A. S. 7 Feb. 1829. *Gray v. Advocates of Aberdeen*, 6 March 1841, 3 D. 813.

an examination in law, which, however, was never very rigorously conducted. This state of matters continued till 1865, when a complete curriculum of study in general knowledge as well as in law was prescribed by the Procurators Act (z) and relative Act of Sederunt, (a) and the period of apprenticeship was lengthened to four years, except in the case of graduates in arts and members of university councils. (b)

19. Before the passing of the Procurators Act in 1865, ^{Procurators Act.} several societies, in addition to those already mentioned as possessing exclusive privileges, had been incorporated by royal charter, viz., the Faculty of Procurators and Solicitors of Dundee, in 1819; the Society of Solicitors of Banffshire, in 1840; and the Society of Procurators and Solicitors of Perthshire. (c) By section 14 of the Procurators Act it was provided that in any county, or division of a county, where there did not exist any incorporated society, it should be lawful for the procurators, if their number exceeded ten, to form themselves into an incorporated society, by the assent in writing of at least three-fourths of their number; and by section 15 provision was made to enable the procurators of districts whose number was less than ten, but more than three, to combine with the procurators of other districts to form an incorporated society. The facilities for incorporation thus afforded were taken advantage of by nearly all the procurators throughout the country. (d) Each incorporated

(z) 28 and 29 Vict. c. 85.

(a) A. S. 22 June 1866.

(b) Sects. 4 and 5.

(c) The following societies also existed prior to 1865, but only as unincorporated associations, viz., the Writers of Stirlingshire, the Procurators of Greenock, and the Procurators of Wigtownshire. There are now three unincorporated societies, viz., the Associated Procurators of Wigtownshire, the Society of Writers in Glasgow, instituted in 1865, and the Society of Writers in the County of Ayr, instituted in 1872.

(d) The following is a list, alphabetically arranged, of the societies incorporated under the Procurators Act :—The Society of Solicitors in Airdrie, the Society of Procurators of Argyllshire, the Ayr Faculty of Solicitors, the Society of Solicitors and Procurators of Caithness, the Faculty of Procurators of Dumbartonshire, the Faculty of Procurators of

society was directed to issue from time to time regulations, subject to the approval of the sheriff, for the preliminary examination of apprentices in general knowledge, and if it thought fit, to impose a curriculum of legal study, and institute compulsory examinations in law at the end of the second, third, and fourth years of apprenticeship. Power was also given to each society incorporated under the Act to establish a fund for the benefit of indigent members, and of the widows and children of members; to provide a law library; and to exact for these and other purposes payment of entrance-fees and annual contributions.(e) The deans or other chief office-bearers of all these societies, whether incorporated prior to the passing of the Act or under its provisions, formed a General Council, meeting at least once a year, whose principal duties were to prescribe a curriculum of legal study, to act as examiners of persons applying for admission as procurators, and to frame regulations as to the subjects of examination, both in general knowledge and in law.(f) The Procurators Act farther provided that it should be competent to any society of procurators previously incorporated to assimilate the conditions and mode of admission to its privileges to the provisions of the Act; but it did not limit or prejudice the rights and privileges

Dumfriesshire, the Society of Solicitors of Elginshire, the Society of Solicitors and Procurators of the Eastern District of Fifeshire, the Society of Solicitors for Fifeshire at Dunfermline, the Society of Procurators and Solicitors of Forfarshire (Forfar District), the Faculty of Procurators of Greenock, the Faculty of Procurators of the County of Haddington, the Society of Solicitors of Hamilton, the Faculty of Solicitors of Invernesshire, the Society of Solicitors and Procurators of Kincardineshire, the Faculty of Procurators of the County of Linlithgow, the Society of Solicitors and Procurators of the Western District of Perthshire, the Society of Solicitors of Peterhead, the Faculty of Procurators for the Rhinns of Galloway, the Faculty of Solicitors of the Combined Counties of Ross and Cromarty, the Society of Solicitors and Procurators of Stirling, the Society of Solicitors of the Eastern District of Stirlingshire, the Faculty of Procurators of the Lower District of Wigtownshire.

(e) Sect. 16.

(f) Sects. 17-23. The curriculum and regulations, &c., were approved of by the Court of Session, in terms of the Act, on 22d June 1866.

of the societies already mentioned as enjoying exclusive privileges.(g)

20. Although the Procurators Act thus effected a very material improvement in the position of country agents, especially as regarded the qualifications of applicants for admission, it did not remedy the anomalies which existed in the law of Scotland relating to law agents, viz., the diversity of qualification, the exclusion of procurators from practice in the supreme courts,(h) the prohibition of arrangements between town and country agents to divide the profits of litigation,(i) and the monopoly of practice in the inferior courts enjoyed by members of the incorporated societies in Aberdeen, Glasgow, Edinburgh, and Paisley. The exclusive privileges of these societies were not favourably regarded,(k) and were to some extent infringed by recent legislation.(l) In 1870 the Royal Commissioners appointed to inquire into the Courts of Law in Scotland unanimously recommended that there should be one general examination applicable to agents throughout the whole country; that all exclusive privileges should be abolished; and that arrangements between town and country agents for the division of profits should be legalised.(m)

21. Effect has now been given to these recommendations by an Act, which was prepared and carried through Parliament by Lord Advocate Young, and which received the

Report of
Royal Com-
missioners.

Law Agents
Act, 1873.

(g) Sects. 12 and 27.

(h) By the Court of Session Act of 1868 (31 and 32 Vict. c. 100, § 50) procurators were allowed to act as agents at jury trials on circuit.

(i) *Braah v. M'Kinnon*, 9 March 1820, 20 F.C. 127; A. B., 12 May 1832, 10 S. 523, affirmed 12 July 1833, 6 W. and S. 489.

(k) *Solicitors of Edinburgh v. Smillie and Others*, 4 Dec. 1828, 7 S. 134, affirmed 24 Nov. 1830, 4 W. and S. 370; *Gray v. Advocates of Aberdeen*, 6 March 1841, 3 D. 813.

(l) Agents entitled to practise in the Court of Session were allowed to conduct in any sheriff-court certain causes which were formerly competent only in the Court of Session; 6 and 7 Will. IV. c. 56, § 21; 1 and 2 Vict. c. 119, §§ 15 and 33; 19 and 20 Vict. c. 79, § 177; 30 and 31 Vict. c. 96, § 4; 31 and 32 Vict. c. 101, § 53. See also 33 and 34 Vict. c. 86, uniting, *inter alia*, the counties of Aberdeen and Kincardine.

(m) Fourth Report, p. 40.

royal assent on 5th August 1873. It is entitled "*An Act to amend the Law relating to Law Agents practising in Scotland*" (36 and 37 Vict. c. 63); but for the sake of brevity it is referred to throughout this treatise as the Law Agents Act. It is printed with notes in the Appendix and its provisions have been incorporated with the following chapters. It is therefore sufficient to state here that, besides carrying out the recommendations of the Royal Commissioners above referred to, the Act enables agents who have already been admitted in any sheriff-court to practise in the Court of Session, without undergoing any additional examination, on paying the difference between the stamp-duty already paid by them and that chargeable on admission to practise in the Court of Session; (n) that a law agent authorised and acting for a client whom he discloses, is declared to incur no liability to any other law agent employed by him, except such as he expressly undertakes in writing; (o) and that the Procurators Act is repealed from and after 1st February 1874; but that this repeal does not prevent societies formed under it prior to 5th August 1873 from continuing to exist as incorporated societies, electing such office-bearers as they please, and admitting members on such terms as they see fit, though it is not necessary for any agent admitted under the Law Agents Act to become a member of any such society. (p)

(n) § 17.

(o) § 21.

(p) § 25 : see also §§ 19 and 20.

CHAPTER I.

QUALIFICATION AND ADMISSION OF LAW AGENTS.

1. The qualifications and mode of admission of law agents are now regulated by the Law Agents Act, which enacts that from and after the date of its passing (5th August 1873), no person shall be admitted as a law agent in Scotland except in accordance with its provisions. (a) The Act, however, contains various provisions of an exceptional character in favour of persons qualifying for admission under the old regulations. (b) The statutes regulating the qualifications and admission of attorneys and solicitors in England and Ireland (c) contain many provisions similar to those of the Law Agents Act, and in construing its clauses considerable aid may therefore be obtained from the decisions of the English and Irish Courts. Accordingly, reference is made in the foot-notes to such of them as appear at all applicable to Scotland.

Qualification and admission now regulated by Law Agents Act

2. It is not now necessary for any law agent to become a member of any society or faculty of law agents, (d) and apprentices to members of such societies cannot be admitted as law agents except under the regulations and in accordance with the provisions of the Law Agents Act. (e) It is

Not necessary to become a member of any society.

(a) Sect. 2. The Act is printed in the Appendix.

(b) Sects. 5 (sub-sect. 3) and 10. See *post*, §§ 21 and 22 of this chapter.

(c) The English statutes now in force are 6 and 7 Vict. c. 73; 23 and 24 Vict. c. 127; and the Supreme Court of Judicature Act, 1873, § 89. The Irish statute is 29 and 30 Vict. c. 84.

(d) Sect. 25 of the Law Agents Act.

(e) Sect. 2.

farther declared to be lawful for any society of law agents to accept of an apprenticeship for five years, served under the provisions of the Act, with an enrolled law agent, although not a member of such society, as a qualification for admission to such society;(*f*) and any society may, notwithstanding any law, statute, or usage hitherto in force, admit any enrolled law agent to be a member of it on such terms as it may see fit.(*g*) These provisions do not prevent any society from requiring any qualifications as to education or apprenticeship, in addition to those prescribed by the Law Agents Act; but probably the only condition of admission that will be insisted in will be a money payment. If, however, any one desires to be admitted as a member of any particular society, he ought, before entering upon his apprenticeship, to communicate with the secretary of the society, in order to ascertain the terms of admission. It may be right to mention here that the members of the Society of Writers to the Signet still retain some exclusive privileges, which, however, are now almost nominal, and do not relate to the actual conduct of litigation.(*h*)

Exemption
of procurators-fiscal
from regulations as to
admission,
&c.

3. The regulations of the Law Agents Act do not appear to extend to procurators-fiscal, who will continue to be appointed by the sheriffs of counties, magistrates of burghs, or justices of the peace, and be entitled to conduct criminal proceedings without being admitted as agents in any civil court.(*i*) The English and Irish regulations do not extend to persons appointed to be solicitors of the treasury, customs, excise, post-office, stamp-duties, or any other branch of Her Majesty's Revenue;(k) but there is no corresponding provision or exemption in the Law Agents Act.

(*f*) Sect. 20.

(*g*) Sect. 19.

(*h*) The existing regulations of the Writers to the Signet, and the Solicitors Act of 1871, containing those of the Society of Solicitors in the Supreme Courts, are printed in the Appendix.

(*i*) *Ward v. Young and Macminn*, 19 May 1847, Arkley, 272; *M'Lean v. Cameron*, 1 Dec. 1845, 2 Broun, 657; *Jardine v. Simpson*, 17 Jan. 1823, S. Just. 94.

(*k*) 6 and 7 Vict. c. 73, § 47; 23 and 24 Vict. c. 127, § 33; 29 and 30

4. The regulations of the Law Agents Act, in regard to the qualification and admission of applicants, fall under three heads:—1, apprenticeship; 2, examination; and 3, admission by the Court of Session. The temporary provisions in favour of persons qualifying under the former system will be best understood after considering the qualifications prescribed for persons entering into apprenticeship after the passing of the Act.

Regulations
prescribed
by Law
Agents
Act, 1873.

5. The apprenticeship required by the Act consists of service with a qualified master, under a valid indenture or contract of service.^(l) The requirements under this head should be very carefully observed; for although the Court has occasionally, in exceptional circumstances, relaxed the rules laid down by itself in Acts of Sederunt,^(m) it has not the same discretionary power in dealing with statutory enactments; and the English cases on this subject show that even after an applicant has been admitted, his name may be struck off the roll on the ground of want of regular and sufficient service, provided the objection is taken within a reasonable time.⁽ⁿ⁾

Apprentice-
ship under
indenture.

Vict. c. 84, § 50. The Procurators (Scotland) Act, 1865, (28 and 29 Vict. c. 85, § 24), contained a similar saving clause, but that Act is now repealed by § 25 of the Law Agents Act, from and after the first day of February 1874.

(l) Sect. 5 of the Act.

(m) *Forbes & Robertson*, 13 Jan. 1835, 13 S. 244; *Gray v. Advocates of Aberdeen*, 6 March 1841, 3 D. 813; A. S. 7 Feb. 1829.

(n) *Ex parte Hill*, 1775, 2 Sir W. Blackstone's Reports, 991; *In re Taylor*, 12 Feb. 1822, 5 Barnewall & Alderson, 538; *In re Taylor*, 14 June 1825, 6 Dowling & Ryland, 428. If an objection taken to an applicant's admission is repelled at the time, it will not be again listened to as a reason for striking his name off the roll; *In re Page*, 7 Feb. 1823, 7 Moore, 572. Where the motion to strike the attorney's name off the roll was made three years and a-half after his admission, it was refused, the Court observing that such an application should be made shortly, as a month or two, or a term or two, after the admission; *Anonymous*, 1831, 2 Barnewall & Adolphus, 766; see also *Paget v. Chambers*, 23 May 1839, 7 Scott, 610, where a similar application, made after 13 years, was refused. It is now provided by 6 and 7 Vict. c. 73, § 29, extending to England, and 29 and 30 Vict. c. 84, § 40, extending to Ireland, that such an application must be made within twelve months of the admission, except in cases of actual

Who may
enter into
indenture.

6. It is not necessary or usual for an apprentice to be of full age at the time of his entering into indenture. There can, however, be no doubt that he should be old enough to be able to study his profession ;(*o*) and as he cannot be admitted until he is twenty-one years of age, (*p*) there is no advantage in commencing an apprenticeship under the age of sixteen. (*q*) If the apprentice is a minor, his father, or, in the event of his father being dead, his curators, must be parties to the indenture. (*r*) But if his father is dead and he has no curators, he may enter into the indenture himself. (*s*) There is nothing to prevent a person who has previously been engaged in some other occupation from entering into indenture and qualifying for admission as a law agent ;(*t*) and, as after-

fraud. By sect. 24 of the Procurators Act it was provided that no person admitted a procurator in terms of that Act should be liable to have his admission challenged or set aside on any ground except fraud.

(*o*) *In re Donne*, 1794, 3 Swanston, 96, *note*, where one of the Clerks of the Court of Exchequer having taken as an articled clerk a boy of nine years of age, the Court erased his name from the roll kept in the office of the King's Remembrancer, whereby the seniority of Clerks of Court was ascertained. *In re Sherry*, 20 Jan. 1868, 9 Best & Smith, 115, where service as a clerk by a lad of fourteen was held sufficient to qualify him under 23 and 24 Vict. c. 127, § 4, which allows a person who has been for ten years a *bona fide* clerk to an attorney to be admitted after an apprenticeship of only three years.

(*p*) Sec. 5, sub-section 1, of the Law Agents Act.

(*q*) Under the existing regulations of the Writers to the Signet, no person under the age of seventeen is taken as an apprentice by a member ; under those of the Society of Solicitors in the Supreme Courts, and of the Society of Advocates in Aberdeen, the age is fixed at sixteen ; and under those of the Faculty of Procurators in Glasgow, and of the Solicitors-at-Law in Edinburgh, at fifteen. But by section 20 of the Law Agents Act any society of law agents may accept of an apprenticeship for five years served under the provisions of the Act with an enrolled law agent, although not a member of such society, as a qualification for admission to such society.

(*r*) *Low v. Henry*, 14 Nov. 1797, Hume, 422 ; *Fraser on Master and Servant*, p. 444.

(*s*) *Fraser on Master and Servant*, p. 444 ; *Fraser on Parent and Child*, p. 336.

(*t*) *Ex parte Waring*, 11 May 1843, 12 Law Journal, Queen's Bench, 280, where it was held to be no bar to the admission of a person who had served the requisite time as an articled clerk or apprentice, that he had

mentioned, the ordinary term of service is shortened in the case of persons who have for five years acted as clerks to law agents, or who have taken a degree in law or in arts, or who have been called to the English or Scotch bar, or who have been admitted as attorneys or solicitors in England.(u)

7. No one is a qualified master except a practising law agent, or a sheriff-clerk in office at the passing of the Law Agents Act (5th August 1873).(x) The omission of the master to take out annually his certificate or license to practise does not disqualify the apprentice from being admitted as law agent.(y) There is nothing to prevent a master from having any number of apprentices at the same time.(z) A person may be competently apprenticed to more than one member of a firm of law agents;(a) and in practice it is quite common for an apprentice to be bound to a firm.(b) But, in such a case, each member of the firm should be a practising law agent, or a sheriff-clerk who was in office on the 5th of August 1873. The difficulties and delays which naturally arise from the death of a master, or the dissolution of a firm, before the expiration of an indenture, are best avoided by taking the apprentice bound to two or more masters in succession; that is to say, to A, whom failing, to B, &c.

Who is a competent master.

8. The Judges of the Court of Session (or any seven or more of them, of whom the Lord President and the Lord Justice-Clerk must be two) are now empowered to make rules for conducting entrance examinations of apprentices;(c) and when these are made and come into force, a certificate from the examiners of having successfully passed

Preliminary examinations of apprentices.

been fourteen years in business as a grocer after the expiration of his articles or indenture.

(u) Section 5, sub-section 6, of the Law Agents Act. See *post*, § 12 of this chapter.

(z) Section 5, sub-section 1, of the Law Agents Act.

(y) 6 Geo. IV. c. 46.

(z) In England, no attorney or solicitor is allowed to have more than two articulated clerks at the same time; 6 and 7 Vict. c. 73, sect. 4.

(a) *In re Holland*, 30 Jan. 1872, 7 Law Reports, Queen's Bench, 297.

(b) *Juridical Styles*, 4th ed., vol. ii. p. 247.

(c) Sect. 8 of the Law Agents Act.

the preliminary examination will probably be required before an indenture is entered into. (d)

Terms and
form of
indenture.

9. An apprenticeship entered upon after 5th August 1873 must be under a written indenture, (e) executed with all the solemnities appropriate to ordinary deeds. (f) No particular form is required, (g) but the apprentice must be bound to serve his master in his professional business for a period not less than that prescribed by the statute, viz., in the ordinary case, five years, or in the exceptional cases after mentioned, three years. (h) In order to avoid any difficulty

(d) The corresponding section of the English Statute, 23 and 24 Vict. c. 127, sect. 8, which is more explicit than the Law Agents Act, is as follows:—"The Lords Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, may from time to time make regulations for the examination in such branches of general knowledge as they may deem proper, of all persons (not having taken degrees or successfully passed such University examinations as aforesaid) hereafter becoming bound under articles of clerkship to attorneys or solicitors, and the said Judges by such regulations may require such examination to be passed either before persons so become bound or at any time before their admission as attorneys or solicitors, as to the said Judges may seem fit, and the said Judges may from time to time revoke or alter any such regulations as they think fit, and may from time to time appoint examiners for conducting such examination as aforesaid; and no person required to pass such examination shall be capable of being bound as aforesaid where such examination is required to be passed before being bound, or of being admitted an attorney or solicitor where such examination is permitted to be passed at any time before admission, unless before being bound or before being admitted (as the case may require) he obtain from the examiners a certificate of having satisfactorily passed such examination: Provided always that the said Judges, or any one or more of them, may, where under special circumstances they or he see fit so to do, dispense with compliance with such regulations entirely or partially, or subject to any such conditions as to them or him may seem fit."

(e) Section 5, sub-section 2, of the Law Agents Act.

(f) Bell's Lectures on Conveyancing, p. 345. As to an improbable contract of indenture being validated by *rei interventus*, see Fraser on Master and Servant, p. 445.

(g) A form is printed in the Appendix.

(h) *Ex parte Jones*, 21 April 1870, 22 Law Times Reports, New Series, p. 300, where it was held that articles of clerkship are void, and that ser-

arising from the service under indenture being insufficient on account of the apprentice's occasional absence during the term, he should be taken bound to serve, at the expiration of the three or five years, an additional period at least equal to the time that he may have been absent;(i) or, what is probably the preferable course, the contract of indenture should be for a considerably longer period than is absolutely necessary, determinable by the apprentice on his actual service of the term required by the Law Agents Act, or any future Act.(k)

10. The indenture must be duly stamped, but a question of some difficulty arises under the provisions of the Law Agents Act, taken in connection with those of the Stamp Act of 1870, as to the amount of stamp-duty now required. The schedule to the latter statute contains the following clause:—"Articles of clerkship whereby any person first becomes bound to serve as a clerk *in order to his admission*. . . .

Stamp required on indenture.

"(2.) As an attorney or solicitor in any of the courts of the counties palatine of Lancaster and Durham, or as a writer to the signet, or *as a solicitor, agent, or attorney in the Court of Session, Justiciary, or Commission of Teinds* in Scotland, £60.

"(3.) As a procurator or solicitor in any inferior court in Scotland, 2s. 6d."

Now, under the provisions of the Law Agents Act, as after-mentioned,(l) the only mode in which any one can now be admitted is by presenting a petition to the Court of Session, praying to be admitted as a law agent; and on being admitted and enrolled, and paying the stamp-duty

vice under them cannot qualify for admission, if the clerk is bound for a less period than five years, unless the case falls under the statutory provisions in regard to a shorter period of service.

(i) It is customary to take apprentices bound to serve two days for each day that they are absent without their masters' leave; *Juridical Styles*, 4th ed., vol. ii., p. 247.

(k) This course is recommended in *Pulling's Law of Attorneys*, 5th ed., p. 37.

(l) Sections 19 and 23 of this chapter.

exigible on admission,(m) he is entitled to practise in the supreme as well as the inferior courts. It may therefore be argued that no one can now become bound to serve as a clerk *in order to his admission as a procurator or solicitor in any inferior court*, and that the stamp must consequently be £60 in all cases. Without expressing an opinion, which might only prove misleading on a question which must very soon be decided, it is sufficient to say that until the point has been judicially settled the only safe course is to have every indenture impressed with a stamp of sixty pounds, which will qualify for both the supreme and the inferior courts.(n) As the same total sum must be paid on indenture and admission, however it may be distributed between them, the only loss that can be sustained by following this course will be the interest on £59, 17s. 6d. for the few years between apprenticeship and admission. Articles of clerkship or indentures may, however, be stamped at any time. If brought to be stamped within six months from their date, no penalty is exigible; if brought after the expiration of the six months, there is no power given by the Stamp Act to withhold the stamp, but penalties must be paid, viz.:—within one year from date, ten pounds; after one year, and within five years, for every complete year, and also for any additional part of a year, elapsed since the date, ten pounds; and in every other case, fifty pounds.(o)

Recording
and intima-
tion to Re-
gistrar.

11. The indenture must be both recorded in the register of probative writs of the county in which it is entered into,(p) and intimated to the registrar of law agents ap-

(m) A similar difficulty arises as to the amount of duty exigible on admission. See *post*, § 23.

(n) "Where the same articles are a qualification for the admission of any person, not only as a writer to the signet, or as a solicitor, agent, or attorney in any of the Courts of Session, Justiciary, or Commission of Teinds, but also as a procurator or solicitor in any inferior court, such articles are not to be charged with more than one duty of sixty pounds." Section 42 (sub-section 1) of the Stamp Act of 1870.

(o) Sect. 43 of the Stamp Act of 1870. Under the previous statute, 19 and 20 Vict. c. 81, § 3, it was within the power of the Lords of the Treasury to withhold the stamp after the expiration of the six months.

(p) By 31 and 32 Vict. c. 34, § 2, it is enacted that writs registered as

pointed under the Law Agents Act within six months from the date fixed for the commencement of the apprenticeship.(g) This should be attended to by the master of the apprentice.(r) It is not stated by the Act whether, in the event of this provision not being timeously complied with, the service under the indenture is to be altogether insufficient to qualify for admission, or merely to count from the time when the indenture is recorded and intimated to the registrar.(s)

12. In the ordinary case the term of service is five years,(t) but three years' service is sufficient in the case of any of the following persons:—1, A person who, either before or after the passing of the Law Agents Act has for

Length of
service re-
quired.

probative writs are not to be given back, but shall remain in the custody of the keepers of the registers. "And where it is by any Act, or by the rules of any corporation or trade, provided that an indenture of apprenticeship, with a certificate of service endorsed thereon, may be received as evidence of such apprenticeship having been duly served, an extract of such indenture duly recorded in the register of probative writs, with a certificate of service endorsed on such extract, may be received as evidence of such apprenticeship having been duly served." Section 3 of the same statute provides that all extracts shall have upon them a certificate or marking indicating the *cumulo* amount of stamp-duty paid on the principal writ recorded, and retained for preservation.

(g) Section 5, sub-section 2, of the Law Agents Act. The general duties of the registrar are set forth in section 11, but no directions are given in regard to the intimation of indentures. There can, however, be no doubt that he should follow generally the same directions as are given to the English registrar by 23 and 24 Vict. c. 127, § 7, viz., enter the names of the parties to the indenture, its date, and the term of service, in a book kept for that purpose, and mark the indenture as having been produced and entered, with the date thereof.

(r) The duty of enrolling the articles of a clerk is thrown on the master by 6 and 7 Vict. c. 73, § 8. See *Dufaur v. Sigel*, 22 July 1853, 22 Law Journal, Chancery, 678.

(s) The English statute on the subject provides that if the contract or articles are not timeously produced and entered by the registrar, the service of the clerk shall be reckoned to commence from the date of the production and entry, unless one of the superior courts, or a judge thereof, shall otherwise order. 23 and 24 Vict. c. 127, § 7; see also 6 and 7 Vict. c. 73, § 9.

(t) Section 5 of the Law Agents Act.

five years been a clerk to, (u) and engaged under the superintendence of a practising law agent, (x) in such business as is usually transacted by law agents; (y) 2, a person holding a degree in law or in arts of a University in Great Britain or Ireland granted after examination; (z) 3, a member of the Faculty of Advocates; (a) 4, a person who has been

(u) It does not appear to be necessary that the two services, as clerk and as apprentice, should be consecutive. Under the corresponding section of the English statute, 23 and 24 Vict. c. 127, § 4, which requires ten years' service as clerk, it was recently held that a clerk was entitled to be admitted after three years' service under articles, although there had been between the two services an interval of seven years, during which he was not engaged in any business connected with the legal profession; *Ex parte Vosper*, 30 Jan. 1864, 33 Law Journal, Queen's Bench, 113.

(x) In deciding whether the service of a clerk has been sufficiently subject to the supervision of his master, the Court will not lay down any general rule, but take into consideration the circumstances of each particular case; *In re Duncan*, 28 April 1864, 33 Law Journal, Queen's Bench, 190.

(y) It has been held that under the corresponding section of the English statute service as clerk by a lad of fourteen is sufficient: but it was observed by Lord Chief-Justice Cockburn that it would not have been sufficient if the lad had been in the office merely as errand-boy or messenger; *In re Sherry*, 29 Jan. 1868, 9 Best and Smith, 115. In this case it was also held that the clerk was entitled to be admitted, although, before the expiry of the ten years of clerkship required by the statute he had entered into articles for five years, under which, however, after the expiration of the ten years he had served three years. And under the corresponding section of the Irish statute, service under various masters was held sufficient, though it was objected that there was nothing to show that the applicant had not been a mere copying clerk; *In re Milliken*, 13 May 1870, 18 Weekly Reporter, 309. If a master refuses to give a certificate of service, the service may be proved by other means; *Ex parte Rigby*, 16 Jan. 1865, 11 Law Times, 671.

(z) A member of the General Council of a Scotch University, who has attended all the necessary classes, but has not actually taken a degree, is not entitled to be admitted after three years' service; *Ex parte Stewart*, 30 Jan. 1872, 7 Law Reports, Exchequer, 202. In order to entitle a graduate to this privilege, it is probably necessary for him to have taken his degree before being bound as an apprentice; and this is expressly required by the English statute, 6 and 7 Vict. c. 73, § 7; *Ex parte Bradford*, 17 Jan. 1869, 28 Law Journal, Queen's Bench, 138.

(a) By 35 and 36 Vict. c. 81, a member of the Faculty of Advocates

called to the degree of Utter Barrister in England; (b) 5, a person who has been admitted and enrolled as an attorney or solicitor in England. (c) Unless the case falls within one or other of these exceptional provisions, service under indenture for only three years cannot qualify for admission; and therefore if there is the least doubt on the subject the term should be fixed at five years, determinable by the apprentice at the end of three years, in the event of the Court or the examiners holding that period to be sufficient.

13. The date at which the apprenticeship is to commence should be stated in the indenture, in order that the deed may show *ex facie* that it is recorded and intimated to the registrar within the six months prescribed by the Law-Agents Act to run "from the date fixed for the commencement of the apprenticeship." (d) If, however, this is not done, the apprenticeship will naturally commence at the date of the last signature to the indenture. (e) Hitherto it has not been unusual, when an intending apprentice has served some length of time before the execution of his indenture, to fix the commencement of his apprenticeship as at the commencement of his actual service; but it would scarcely be safe to do so now, as the Law Agents Act imperatively requires that "an apprenticeship entered upon after the passing of this Act must be served under inden-

Commence-
ment of
apprentice-
ship.

may also be admitted, after a three years' service under articles, as an attorney and solicitor in England and Wales.

(b) It has been held that a barrister cannot serve as an articulated clerk for the purpose of being admitted as an attorney without first being disbarred; *In re Bateman*, 1845, 2 Dowling and Lowndes, 725. By 23 and 24 Vict. c. 127, § 3, a person who before becoming a barrister has been bound under articles for five years, or who, after ceasing to be a barrister has been bound for three years, and who in either case has continued to serve for three years, is entitled to be admitted an attorney or solicitor.

(c) The corresponding section of the English statute, 23 and 24 Vict. c. 127, § 15, admits Scotch law agents as attorneys in England after three years' service under articles.

(d) Section 5, sub-section 2.

(e) *Anonymous*, 24 Nov. 1857, 27 Law Journal, Queen's Bench, 184, where the six months allowed for the enrolment of articles of clerkship were reckoned from the date of the last signature.

ture,"(f) and service prior to the execution of the indenture might not be regarded as service "under indenture." In any case, the provisions in regard to recording and intimation to the registrar within six months from the date fixed for the commencement of the apprenticeship,(g) render it impossible to antedate the commencement of the apprenticeship more than six months.

Service during apprenticeship.

14. In England an articulated clerk is required by statute during the whole time and term of his service to continue and be actually employed by his master in the proper business, practice, or employment of an attorney or solicitor, except in the cases particularly provided for by the statute.(h) There is no precisely corresponding provision in the Law Agents Act, and a sheriff-clerk in office at the date of its passing is recognised as a qualified master.(i) But before being admitted as a law agent, every applicant must make affidavit that he has actually served an apprenticeship to a qualified master or masters during the whole time required by the statute;(k) and there can be no doubt that an apprentice should be employed during the whole time and term of his service in such business as is usually transacted by law agents or sheriff-clerks, and that he ought not to hold any other office or engage in any other business,(l) or carry on business as a law agent on his own account, before the expiration of his service under indenture.(m) But there does not seem to be any objection to his employing his leisure time after the usual office hours in any way that he pleases;(n) and in order to make

(f) Section 5, sub-section 2.

(g) *Ante*, § 11 of this chapter.

(h) 6 and 7 Vict. c. 73, § 12. See also *Scriveners Company v. The Queen*, 28 Nov. 1842, 12 Law Journal, Exchequer, 492.

(i) Section 5, sub-section 1.

(k) Section 6.

(l) *Ex parte Hill*, 1775, 2 Sir W. Blackstone's Reports, 991; *In re Taylor*, 12 Feb. 1822, 5 Barnewall and Alderson, 538; *In re Taylor*, 14 June 1825, 6 Dowling and Ryland, 428; *Ex parte Carr*, 1842, 3 Adolphus and Ellis, Queen's Bench 447.

(m) *Anonymous*, 1831, 2 Barnewall and Adolphus, 766.

(n) *Ex parte Blunt*, 1771, 2 Sir W. Blackstone's Reports, 763, where it

affidavit that he has actually served the whole time required by the statute, it is obviously not necessary that an apprentice should have served three or five years, as the case may be, without any break or interval except Sundays and public holidays.(o) It is not unusual for apprentices to be allowed a month in each year for relaxation, and an absence of two months at a time, with the master's consent, has been held in England not to affect the service.(p) An absence of much longer duration may be allowed to count as service under indenture, if it has been rendered absolutely necessary by illness. In exceptional circumstances the English courts have allowed as long a period of absence as two out of the five years to be reckoned as actual service.(q) But in ordinary circum-

was held that an articulated clerk, performing all his master's business, may at leisure hours work for wages with another attorney; *Ex parte Llewellyn*, 1843, 2 Dowling's New Reports, 701, where an articulated clerk who had discharged the duties of auditor of a poor-law union, which occupied him for a very inconsiderable period of time, and to which he never gave any attention until after the usual office-hours of his master, was held to have sufficiently served his time under his articles. An articulated clerk is now expressly prohibited by 23 and 24 Vict. c. 127, § 10, from holding any office or engaging in any other employment than that of clerk to his master. But even this provision was held not to disqualify a clerk who had, with the leave of his employer, spent two or three days in as many years in fulfilling the duties of steward of a manor, which had devolved upon him by inheritance, and the duties of which had otherwise been performed by deputy; *Ex parte Peppercorn*, 3 May 1866, 35 Law Journal, Common Pleas, 239.

(o) "An attorney's clerk is often away with the permission of his master for weeks at a time on a visit to his friends. An absence of this kind would not, I think, prevent him making an affidavit that he had served during the five years."—*Per Coleridge, J.* in the case of *Ex parte Brutton*, 11 May 1854, 23 Law Journal, Queen's Bench, 290.

(p) *Ex parte Hubbard*, 7 June 1832, 1 Dowling, 438. In this case, however, two additional months had been served at the end of the five years.

(q) *Ex parte Beddoe*, 14 June 1865, 12 Law Times, N. S., 711. See also *Ex parte Matthews*, 1838, 1 Barnewall and Adolphus, 160; *Ex parte Cross*, 1843, 2 Dowling's New Reports, 692; and *Anonymous*, 9 Nov. 1863, 9 Law Times, N. S., 324; in all of which cases the period of absence on account of illness was between one and two years. In such cases the fact that the articulated clerk has, notwithstanding his absence, done all

stances an absence of more than one year, even though it has been occasioned by illness, is apt to occasion difficulty.(r) Where there has been a prolonged absence, it ought to be stated and accounted for in the affidavit of service.(s) If such a period of absence is not allowed to be reckoned as actual service, the service of a similar period at the expiration of the three or five years of apprenticeship will doubtless be regarded as equivalent,(t) at least where the apprentice has been taken bound, as he ought to be in his indenture, to make up for lost time.(u)

Part of apprenticeship may be served with a second master.

15. "A master may permit his apprentice to serve any part of his term, not exceeding two years, with another qualified master."(x) Under this clause the whole service will be regarded as under the indenture to the first master,(y)

that he could in the way of study to qualify himself for his profession, has much weight in inducing the court to admit him.

(r) *Ex parte Hodge*, 1838, 2 English Jurist, 989, where an articulated clerk was with some hesitation admitted by the court, notwithstanding an absence of an entire year, Littledale, J., observing:—"If the absence had been for less time than a year, I should not have felt much difficulty." See also *Ex parte Rodgers*, 26 Jan. 1864, 34 Law Journal, Queen's Bench, 136, where a clerk who had been incapacitated for more than a year from serving applied to the court before the expiration of the five years that the interval during which he had been unable to serve might be allowed to count as actual service, but the application was refused as premature.

(s) In England, if the examiners are satisfied that the absence is accounted for by illness, they invariably proceed to examine the candidate for admission; *Ex parte Peel*, 10 May 1844, 7 English Jurist, 724.

(t) *Ex parte Hubbard*, 7 June 1832, 1 Dowling, 438; *Ex parte Frost*, 1835, 3 Dowling, 322; *Ex parte Peel*, 10 May 1844, 7 English Jurist, 724.

(u) The apprentice is generally taken bound not to absent himself from his master's service without leave asked and given, under pain of two days' service for each day's absence; Juridical Styles, 4th edition, vol. ii., p. 247. But as the service is imperatively required by the Law Agents Act to be under indenture, the apprentice should now be also taken bound to serve one day extra for each day's absence through illness or other unavoidable cause, if such additional service shall be considered necessary by the Court or the examiners.

(x) Section 5, sub-section 5, of the Law Agents Act.

(y) Under the corresponding section of the English statute, 6 and 7 Vict. c. 73, § 6, it has been held that a year spent with the second master

and an assigation or fresh indenture will not be required. But in order to preserve evidence of his master's consent having been obtained, the apprentice should get the master to endorse on the extract of his indenture a probative note or memorandum giving the necessary consent. The terms of the clause, taken by themselves, seem wide enough to include the case of a person apprenticed for only three years; but as the provisions in regard to a three years' apprenticeship do not precede but follow the clause above quoted, it was probably not intended that a master should permit his apprentice to serve with another master so great a proportion of his term as two out of three years.(z)

16. The Judges of the Court of Session (or any seven or more of them, of whom the Lord President and the Lord Justice Clerk must be two) are now empowered to make regulations for the examination of apprentices during the period of their service;(a) and when these regulations are made and come into force, those who fail to pass the prescribed examination will probably be liable to have their final examination postponed.(b)

Inter-
mediate ex-
aminations.

immediately after the execution of the articles, and without any actual service under them to the first master, is equivalent to a year's service under the articles; *In re an Articled Clerk*, 6 May 1871, 19 Weekly Reporter, 780.

(z) The corresponding sections of the English statutes, 6 and 7 Vict. c. 73, sects. 6 and 7, and 23 and 24 Vict. c. 127, sect. 6, do not allow more than one year out of the three to be spent with a second master; but where a clerk is bound for either four or five years, two may be so spent. See also *Ex parte Earle*, 7 May 1854, 17 English Jurist, 440. The corresponding section of the Procurators Act of 1865 (28 and 29 Vict. c. 85, § 8) allowed one year of the apprenticeship to be served with another master, only if the period of the indenture exceeded three years.

(a) Section 8 of the Law Agents Act.

(b) The corresponding section of the English statute, 23 and 24 Vict. c. 127, § 9, which is more explicit than the Law Agents Act, is as follows:—
“The Lord Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, may from time to time, if they see fit, make regulations for the examination of persons hereafter becoming bound under articles of clerkship as aforesaid, at such times or periods of their service under such articles as the said Judges may think fit and direct, in order to

Fresh service in case of master's death, &c.

17. "When, from necessary or reasonable cause, the whole period of apprenticeship under an indenture cannot be completed with the master therein named, the remainder of the period may be completed with another qualified master."(c) Among the necessary or reasonable causes contemplated by the statute may be mentioned the master's death,(d) or insanity,(e) or his ceasing to be a qualified master, as by his retiring from practice.(g) When from any such cause the whole period of apprenticeship cannot be completed with the master named in the indenture, it will not do for the apprentice to serve the remainder of the period with another master on a merely verbal engagement, for the whole apprenticeship must now be served under indenture.(h) The Law Agents Act contemplates the service being in such cases completed under an assignation of the indenture, and requires the assignation to be intimated to the regis-

ascertain the progress made by such persons in acquiring the knowledge necessary for rendering them fit and capable to act as attorneys or solicitors, and such examination shall be conducted by the examiners appointed under the first herein-mentioned Act, or such other examiners as the said Judges may from time to time appoint in this behalf; and the said Judges may, by such regulations in the case of persons who fail to pass such examination to the satisfaction of the examiners, postpone, either for a definite time, or such time as the said examiners may in each case think proper, and either conditionally or otherwise, the examination required to be passed at the expiration of the term of service under articles and before admission."

(c) Section 5, sub-section 4, of the Law Agents Act. See also the English statute, 6 and 7 Vict. c. 73, § 13.

(d) *Ex parte Tomkins*, 1837, 6 Dowling, 3; *Ex parte Lewis*, 1844, 2 Dowling and Lowndes, 130.

(e) *Ex parte Darbell*, 1838, 6 Dowling, 505; *Ex parte Turner*, 20 April 1841, 10 Law Journal, Queen's Bench, 356; *Ex parte Brown*, 1841, 9 Dowling, 526; *Ex parte Allen*, 21 Nov. 1844, 8 English Jurist, 1169.

(g) *Ex parte Hancock*, 1842, 2 Dowling's New Reports, 54. See also *Anonymous*, 7 Nov. 1815, 1 Chitty, 558; *Ex parte Wilkinson*, 1841, 9 Dowling, 320; and *Ex parte Carnley*, 1843, 2 Dowling's New Reports, 945, where clerks were discharged by the Court on account of their masters having become bankrupt and absconded; and 6 and 7 Vict. c. 73, § 5.

(h) Section 5, sub-section 2, of the Law Agents Act.

trar within six months of its date.(i) Where the first master is alive and subject to no legal incapacity, he will of course execute the assignation, with consent of the apprentice, and no difficulty will arise. But the Law Agents Act makes no express provision for the case of the master dying(k) or becoming incapacitated during the currency of the term of apprenticeship, or unreasonably or improperly refusing to execute an assignation of the indenture. In such circumstances it is recommended that a petition be presented to the Court of Session, praying the Court to discharge the indenture, and to authorise the term of service to be completed with another qualified master under a fresh indenture; as the English courts exercise similar powers, both at common law(l) and under express statutory provisions.(m) When a fresh indenture has been entered into, it ought to be intimated to the registrar within six months of its date, this being expressly required in the case of an assignation, a term which may reasonably be construed to include any deed by which a person who has not completed his service, so as to be entitled to admission, becomes bound afresh. Such new deed, whether an assignation or a second indenture, requires a stamp of ten shillings only.(n) The whole term of apprenticeship, it must be borne in mind, requires to be

(i) Section 5, sub-section 2.

(k) When the master's death does not occasion any loss of time in the service, an assignment by the master's executor who has taken out administration, seems to be sufficient at common law in England; *Ex parte Tomkins*, 1837, 6 Dowling, 3; *Ex parte Lewis*, 1844, 2 Dowling and Lowndes, 130.

(l) *Anonymous*, 7 Nov. 1815, 1 Chitty, 558; *Ex parte Darbell*, 1838, 6 Dowling, 505. See also Tidd's Practice, 9th ed., p. 68.

(m) 6 and 7 Vict. c. 73, §§ 5 and 13; 29 and 30 Vict. c. 84, §§ 6 and 17 (Irish); *Ex parte Brown*, 1841, 9 Dowling, 526; *Ex parte Allen*, 21 Nov. 1844, 8 Jurist, 1169. See also the Procurators Act, 28 and 29 Vict. c. 85, § 7.

(n) "Articles of clerkship, whereby any person having been before bound by duly stamped articles to serve as a clerk, in order to his admission in any of the courts aforesaid, and not having completed his service so as to be entitled to such admission, becomes bound afresh for the same purpose, 10s."—Schedule to the Stamp Act of 1870.

served under indenture. Hence, the interval between the death(o) or disqualification of the first master,(p) and the date of the execution of the assignation or fresh indenture cannot be reckoned as part of the three or five years' service required by the statute, even although such interval has been passed in the service of the second master.(g) The term of a fresh indenture should therefore be the whole time that has not been properly served under the old indenture, thus embracing the period during which the former master has been disqualified by insanity or other cause from being a competent master.(r) In several cases where articulated clerks have lost a considerable part of their time under articles, owing to illness, &c., the English courts have allowed them to enter into fresh articles for such periods as would make up for the time so lost, and even declared beforehand that the service under the old articles should count.(s) But in recent cases they have refused such applications,(t) leaving it open, however, to the applicants to apply to have such period computed when they should have served a sufficient time under new articles.

Qualified
person may
apply for
admission
at any time.

18. A person who has complied with the regulations of the statute in regard to qualifications and apprenticeship is entitled to be admitted as a law agent; and there is no limit

(o) *Ex parte Dalton*, 1810, 9 Dowling, 110; *Ex parte Wallis*, 17 April 1862, 31 Law Journal, Queen's Bench, 176.

(p) *Ex parte Rowle*, 3 Feb. 1820, 2 Chitty, 61; *Ex parte Turner*, 20 April 1841, 10 Law Journal, Queen's Bench, 356.

(g) *Ex parte Brutton*, 11 May 1854, 23 Law Journal, Queen's Bench, 290.

(r) *Ex parte Turner*, 20 April 1841, 10 Law Journal, Queen's Bench, 356. See also *Ex parte Tomkins*, 1837, 6 Dowling, 3.

(s) *In re Smith*, 26 Jan. 1822, 1 Dowling and Ryland, 14; *Ex parte Smith*, 10 May 1859, 28 Law Journal, Queen's Bench, 263; *In re Hayward*, 13 Nov. 1862, 11 Weekly Reporter, 67; *In re Thomas*, 22 Jan. 1863, 11 Weekly Reporter, 341; *Ex parte Gardner*, 7 May 1863, 8 Law Times, N. S., 315; *Ex parte De Fivas*, 4 Nov. 1864, 4 Best and Smith, 992, and 34 Law Journal, Queen's Bench, 7.

(t) *Ex parte Kettle*, 14 Jan. 1865, 34 Law Journal, Queen's Bench, 136; *Ex parte Trenchard*, 17 Jan. 1870, 21 Law Times, 638; and *Ex parte Rodgers*, 26 Jan. 1865, 34 Law Journal, Queen's Bench, 136. See also *Ex parte Unthank*, 28 Nov. 1828, 2 Moore and Payne, 453.

to the time within which his application may be presented. It would even seem to be no bar to admission that there has been a very long interval during which he has been engaged in commercial pursuits or some other vocation.(x) An applicant for admission must be at least twenty-one years of age;(y) and he is required, before being admitted, to make affidavit that he has actually served an apprenticeship to a qualified master or masters during the whole time required by the Law Agents Act,(z) so that he cannot possibly be admitted sooner than the day after the expiry of the three or five years of his apprenticeship.(a) But the Court may, perhaps, in special circumstances, allow an applicant to be examined before the completion of his service, in order that he may be admitted immediately thereafter.(b)

19. The only mode of admission is that prescribed by the Law Agents Act, viz., by petition to the Court of Session, praying their Lordships to admit the applicant as a law agent. The petition may be presented to any Judge of the Court officiating as a Lord Ordinary; and the proceedings under it may take place and be conducted before the same or any other judge, according to the judicial arrangements of the Court for the time being, a single judge being entitled to act as the Court with reference to all such petitions.(c)

Petition for admission.

(x) *Ex parte Waring*, 11 May 1843, 12 Law Journal, Queen's Bench, 280, where it was held no bar to the examination of a person, in order to his admission as an attorney, that he had been fourteen years in business as a grocer since serving his time as an articled clerk, and had not previously applied to be admitted.

(y) Section 5, sub-section 1, of the Law Agents Act. See also *Ex parte Cragg*, 1838, 6 Dowling, 256.

(z) Sect. 6.

(a) *In re Ellis*, 31 Jan. 1862, 5 Law Times, N. S., 686, where it was held that a clerk, articled on 31 Jan. 1857 to serve for five years next ensuing the date of the articles, could not be admitted on 31 Jan. 1862, but might be admitted on the following day. See also *In re Mackay*, 29 April 1868, 18 Law Times, 370.

(b) By the English statute, 23 and 24 Vict. c. 127, § 12, it is provided that when the period of clerkship expires in vacation the clerk may pass his examination in the term immediately preceding. See also *Ex parte Bousfield*, 8 May 1841, 10 Law Journal, Queen's Bench, 361.

(c) Sect. 7.

Though it is not declared incompetent to present a petition to the Inner House, it is obviously intended that in the ordinary case it should come in the first instance before a Lord Ordinary. The expression "any judge of the Court officiating as a Lord Ordinary," seems specially designed to include not only the judges who sit in the Outer House during session, but also the judges who officiate in rotation on the Bills during the vacations, and thus to prevent the delay and inconvenience which would necessarily arise if the petition could be presented and carried through only during the sittings of the Court. (d) The Law Agents Act contains no special provisions in regard to the form of petitions for admission, their printing and boxing, &c. ; but an Act of Sederunt will probably be passed to regulate these matters. (e) Any law agent who has been duly admitted and enrolled, or any incorporation of law agents, will probably be held to have a good title to oppose the application of a person who is not duly qualified. (g)

Examina-
tions.

20. The seventh section of the Law Agents Act provides that, when a petition is presented, the Court shall examine and enquire, by such ways and means as they shall think proper, touching the indenture and service (h) and the fitness

(d) Under the Supreme Court of Judicature Act, 1873, § 89, attorneys or solicitors in England are to be admitted in future by the Master of the Rolls, who appears to have hitherto fixed the time for admission out of term; *Ex parte Steele*, 9 June 1864, 33 Law Journal, Queen's Bench, 326. See also 23 and 24 Vict. c. 127, § 12.

(e) As to the signature of counsel to such summary petitions, see A. S. 19 Dec. 1710; A. S. 15 June 1738; A. S. 5 March 1789; A. S. 11 July 1828, § 12; Note, 14 Nov. 1855, 18 D. 33; *Denny v. M'Nish*, 16 Jan. 1863, 1 Macph. 268; *Jaffray v. Jaffray*, 19 Dec. 1863, 2 Macph. 355. As to printing and boxing, see *Thoms on Judicial Factors*, pp. 341, 356, 368; and, as to intimation and service, see A. S. 14 Oct. 1868, § 18.

(g) *Mitchell v. Gregg*, 7 Dec. 1815, 19 F. C. 46; *Procurators of Paisley v. Craig*, 8 March 1823, 2 S. 283 (N. E. 249); *Sands v. Meffan*, 20 Jan. 1829, 7 S. 290.

(h) An extract of the indenture and any assignation thereof should of course be produced; and a probative discharge by the master will probably be accepted as sufficient evidence of service. In England various

and capacity of the applicant to act as a law agent; and that if satisfied by such examination or by the certificate of examiners as after mentioned that he is duly qualified and fit and competent to act as a law agent, the Court shall admit him. The eighth section then provides that "for the purpose of facilitating the inquiry touching the due service under indenture as aforesaid, and the fitness and capacity of any person to act as a law agent, it shall be lawful for the Judges of the Court (or any seven or more of them, of whom the Lord President and Lord Justice-Clerk shall be two), from time to time to nominate and appoint fit and proper persons to be examiners for the purposes of this Act; and it shall be lawful for the said Judges from time to time to prescribe the subjects in law and general knowledge, and to make rules for conducting such examinations,"⁽ⁱ⁾ and also for entrance examinations of apprentices, and intermediate examinations, as already mentioned. Under the seventh section the inquiry and examination will probably be conducted under a remit by the Court to any person competent to act as an examiner; and an examination in general knowledge does not seem to be required, provided it sufficiently appears that the applicant is fit and competent to act as a law agent. But when, under the eighth section, the examiners come to be appointed, the subjects of examination in law and general knowledge prescribed, and rules made for conducting the examinations, the provisions of the seventh section above referred to will be practically superseded.^(m)

questions in regard to the service are required to be answered by the clerk and his master; *Rules of the Courts of Queen's Bench, Common Pleas, and Exchequer*, 20 Jan 1853, 1 Ellis and Blackburn's Reports, Appendix, p. 57. The matter will probably be regulated in Scotland by an Act of Sederunt.

(i) The English rules on the subject will be found in 1 Ellis and Blackburn's Reports, Appendix, p. 57.

(m) In England the former practice of the Courts was to make personal inquiry as to the fitness and capacity of candidates. But under the Act, now repealed, 2 Geo. II. c. 23, § 6, examiners were appointed in 1836, and their powers were farther regulated by 1 Vict. c. 56, and 1 and 2 Vict. c. 45, § 2, both now repealed. The statutes now in force are 6 and 7 Vict. c. 73, and 23 and 24 Vict. c. 127.

44 QUALIFICATION AND ADMISSION OF LAW AGENTS.

The number of examiners to be appointed is not fixed by the statute, but three are to be a quorum at any examination; the examiners present are to appoint one of their number to be chairman, and each applicant must prior to his examination pay two guineas to the chairman, to be divided among the examiners present. (n)

Temporary provisions in favour of persons qualifying under the old regulations.

21. The temporary provisions in favour of persons who at the date of the passing of the Law Agents Act (5th August 1873), were qualifying themselves for admission under the old regulations, are contained in section 10, and sub-section 3 of section 5. As the precise terms in which these provisions are expressed may be of great importance in individual cases, they are here quoted at full length:—

“5. With respect to the qualifications for admission as law agents under this Act, the following provisions shall have effect:— . . . (3.) Any person who before the passing of this Act has entered upon an apprenticeship, with or without indenture, for a shorter term than five years, with a master qualified according to the law then existing, may serve, without indenture, with the same or another master the additional period necessary to make up five years.”

“10. During the period of three years immediately following the passing of this Act it shall be lawful for the Court to admit an applicant although he shall not have complied with the provisions of this Act with respect to qualifications for admission, provided he shall establish to the satisfaction of the Court that at the date of the passing of this Act—

(n) In England the persons appointed examiners under the corresponding sections of 6 and 7 Vict. c. 73, are the masters for the time being of the Courts of Queen's Bench, Common Pleas, and Exchequer, together with sixteen attorneys or solicitors annually appointed by rule of Court, and five are a quorum. No one is admitted without a certificate by a majority of the examiners present testifying his fitness and capacity, and this certificate remains in force only to the end of the term next but one following its date, unless the time is specially extended by the order of a judge. The only fees payable are 10s. on leaving the articles and any assignment for inspection, and two guineas for the examiners' certificate; 1 Ellis and Blackburn's Reports, Appendix, p. 57.

"(1.) He was entitled to be admitted a procurator under 'The Procurators (Scotland) Act, 1865;' or

"(2.) He was in course of qualifying himself for admission according to the provisions of 'The Procurators (Scotland) Act, 1865,' and that at the date of his application he would, according to these provisions, have been qualified to be taken upon examination by the examiners under that Act, and shall undergo an examination under this Act; but no person who was under indenture at the passing of 'The Procurators (Scotland) Act, 1865,' or who had completed his term of apprenticeship prior to the passing of that Act, shall be required to undergo an examination in general knowledge under this Act;

"(3.) He had been remitted to the General Council of Procurators for examination, and is before first October next certified by them to be qualified."

It may be observed that the latter section underwent considerable alterations in the course of the passing of the measure through the two Houses of Parliament, and that this accounts for its not hanging very well together. But the fair construction of the two sections above quoted, taken together, seems to be as follows:—1, Every person who, on 5th August 1873, was serving as an apprentice or as a clerk (for an apprenticeship without indenture cannot be distinguished from a clerkship)(o) may apply for admission as soon as he has served five years. 2, Every person who, on 5th August 1873, had already served five years as an apprentice or as a clerk, may apply for admission at any time, for it cannot be supposed to have been intended that those who had already served the requisite time should be in a worse position than those who were only in course of doing

(o) Under A. S. 10 July 1839, § 157, an applicant for admission as a procurator required to have served three years *as an apprentice*, but as no written indenture was required, a clerk was always regarded as an apprentice. If the contrary construction were to be adopted, no provision would be made for those who, on 5th August 1873, were qualifying themselves for admission as Solicitors in the Supreme Courts by serving a clerkship under § 24 of the Solicitors Act, 1871. The Act is printed in the Appendix.

so. 3, Both classes of persons are liable to be examined in general knowledge, as well as in law, unless they fall within the exceptions contained in the 10th section. 4, As it is declared that those to whom the 10th section applies may be admitted although they shall not have complied with the provisions of the Act with respect to qualifications for admission, they do not necessarily require to have served so long a period as five years.(p) 5, The first exceptional provision in section 10 refers to those who, on or before 5th August 1873, obtained a certificate from the examiners, and were consequently entitled to be admitted as procurators under section 12 of the Procurators Act. 6, The third exceptional provision in section 10 refers to those who, on or before 5th August 1873, were remitted by the sheriff for examination under section 11 of the Procurators Act, and who, after undergoing the examination held on the second Thursday of September, were before 1st October certified by the examiners to be qualified. 7, The two latter classes of persons, having undergone all the examinations necessary under the former system, will be admitted without any further examination, either in general knowledge or in law. 8, The second exceptional provision of section 10 includes two classes of persons, who are differently dealt with—*first*, those who, on 5th August 1873, were in course of qualifying themselves for admission according to the provisions of the Procurators Act, that is to say, under written indenture for four, or in the case of graduates or members of university councils, three years; and, *secondly*, those who were under indenture at the date of the passing of that Act (5th July 1865), or who had, prior to that date, completed their term of apprenticeship of three years, with or without written indenture.(q) The first of these classes are liable to be examined both in general knowledge and in law, and the second only in law.

(p) Under the Procurators Act, § 4, the ordinary term of apprenticeship was only four years. The Act is printed in the Appendix to this treatise.

(q) A. S. 10 July 1839. See also § 11 of the Procurators Act.

22. Another exemption from the regulations as to apprenticeship and examination is contained in the 24th section of the Law Agents Act, which provides that any notary public who has during the period of seven years immediately preceding 5th August 1873 regularly taken out a stamped certificate as required by law, and who has during that period been engaged in actual practice as a law agent or conveyancer, as well as a notary public, may at any time within one year after 5th August 1873 be admitted as a law agent under the Act, if the Court shall see fit, without making an affidavit of having served an apprenticeship, and without being subjected to examination. The expression "if the Court shall see fit" seems to place the matter very much within the discretion of the Court; but it may be safely assumed that no one possessing the requisite qualifications will be refused admission, unless there are serious objections to his moral or professional character.

Temporary provision in favour of notaries applying for admission as law agents.

23. When an applicant has complied with the regulations of the Law Agents Act in regard to apprenticeship and examination, or is entitled to be exempted therefrom under the provisions above-mentioned, "the Court shall cause him to be admitted a law agent, and his name to be enrolled as such, which admission shall be in writing and signed by a judge of the Court, and shall be stamped with the stamps required by law to be impressed on the admission of law agents."^(r) Under this clause, taken in connection with the Stamp Act of 1870, a difficulty arises as to the amount of duty payable by those who do not intend to subscribe the roll of agents practising in the Court of Session, as after-mentioned. Under the former system, those who were admitted by the sheriff as procurators or solicitors in any inferior court paid £30 less on their admission than those who were admitted as agents in the supreme courts.^(s) But as all admissions must now

Stamp-duty payable on admission.

(r) Sect. 8.

(s) "ADMISSION in Scotland of any person—

"(1.) As a writer to the signet, or as a solicitor, agent, or attorney in the Court of Session, Justiciary, or Commission of Teinds :—

"If he has previously paid the sum of £60 for duty upon his articles of clerkship, £25.

be by the Court of Session, it does not seem possible for any one to be admitted merely as a procurator or solicitor in an inferior court; and it may, consequently, be argued that unless the 12th, 13th, and 17th sections of the Law Agents Act refer to agents to be admitted in future, as well as to those who have already been admitted, the higher rate of stamp-duty on admission will in all cases be exigible. If this view is correct, the following will be the duties payable on admission, viz., if the candidate has previously paid the sum of £60 for duty on his indenture, £25; if he has been, prior to 5th August 1873, duly admitted as a procurator or solicitor in any inferior court, no farther admission is required, (t) but, in order to practise in the Court of Session, he must pay £30; and in any other case, £85.(u)

“ If he has been previously duly admitted as a procurator or solicitor in any inferior court, £30.

“ In any other case, £85.

“(2.) As a procurator or solicitor in any inferior court :—

“ If he has previously paid the sum of 2s. 6d. for duty on his articles of clerkship, £54, 17s. 6d.

“ In any other case, £55.

“ *Exemptions.*

“(1.) Where a person has been duly admitted as a writer to the signet, or as a solicitor, agent, or attorney in the Court of Session, Justiciary, or Commission of Teinds, his admission to act in either of those capacities in any other of the said courts, or as a procurator or solicitor in any inferior court, is exempt from duty.

“(2.) Where a person has been duly admitted as a procurator or solicitor in any inferior court, his admission as a procurator or solicitor in any other inferior court is exempt from duty.”—Schedule to the Stamp Act of 1870 (33 and 34 Vict. c. 97).

(t) “ An enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent in a sheriff court shall be qualified to sign the roll of agents practising in the Court of Session on paying the difference between such duty and the duty chargeable on admission to practise in the Court of Session.”—Sec. 17 of the Law Agents Act. See also §§ 12 and 13, *infra*.

(u) Schedule to the Stamp Act of 1870, *supra*. The following are the special regulations of the Stamp Act as to admissions generally :—

“ 29. The duty payable under the Act upon an admission is to be denoted on the instrument of admission delivered to the person admitted if

23. The Law Agents Act imperatively requires the enrolment on or before 1st February 1874 of all law agents who have already been admitted.(x) For this purpose a new office is created, that of Registrar of Law Agents, who is directed to keep an alphabetical register of all law agents enrolled under the Act.(y) The roll is to be made up by certified lists, to be prepared and delivered to

Enrolment
of all law
agents now
required.

there be any such instrument, or, if not, on the register, entry, or memorandum of the admission in the rolls, books, or records of the court, inn, college, borough, burgh, company, corporation, guild, or society in which the admission is made; and in cases in which no instrument of admission is delivered, and no register, entry, or memorandum is made, on the rescript or warrant for admission.

"30. If any person whose office it is to prepare or deliver out any instrument of admission chargeable with any duty, or to register, enter, or make any memorandum of any admission in respect of which no instrument of admission is delivered to the person admitted, neglects or refuses, within one month after the admission, to prepare a duly stamped instrument of admission, or to make a proper and duly stamped register, entry, or memorandum of the admission, as the case may require, he shall forfeit the sum of ten pounds."

(x) By § 1 it is declared that "'law agent' shall include writers to the signet, solicitors in the supreme courts, procurators in any sheriff-court, and every person entitled to practise as an agent in a court of law in Scotland :

" 'Enrolled law agent' shall mean any law agent enrolled pursuant to the provisions of this Act."

(y) "11. One of the principal, depute, or assistant clerks of session, to be nominated from time to time by the Lord President and Lord Justice-Clerk, shall be the registrar of law agents under this Act.

"It shall be the duty of the registrar to keep an alphabetical register of all enrolled law agents, and enrolment in such register shall be deemed to be enrolment under this Act, and he shall strike out the name of any law agent on an order of the Court, or on application made to him by such agent in writing to that effect; and he shall, on the application of any enrolled law agent, grant a certificate of his enrolment, and shall receive for each enrolment in the register and certificate of enrolment a fee of two shillings and sixpence. The register shall be kept in the office, in the register house, of the principal, depute, or assistant, clerk of session acting for the time as registrar, and the registrar shall, in keeping the same, and generally in the discharge of his duties, give obedience to such directions as he may from time to time receive from the Lord President and Lord Justice-Clerk."

the Registrar on or before 1st February 1874, containing the names and designations of the members of societies incorporated prior to 5th July 1865,(z) and of persons admitted as procurators in the sheriff-courts prior to 1st February 1874, and not included in the above lists.(a) The persons on whom the duty of preparing and delivering these lists is imposed by the statute, should lose no time in doing so immediately after the appointment of the Registrar. For although the register will not be completed till 1st February 1874, there seems to be nothing to prevent a law agent from sooner obtaining a certificate of his enrolment, and thus becoming entitled under the provisions of the statute to practise as an agent in any court.(b) Besides,

(z) "3. On or before the 1st day of February 1874 the Deputy Keeper of the Signet, or other person to be appointed for the purpose by the Society of Writers to the Signet, the President of the Incorporated Society of Solicitors in the Supreme Courts, or other person to be appointed for the purpose by that society, and the President or Dean of each society of law agents which before the passing of 'The Procurators (Scotland) Act, 1865,' was incorporated by Act of Parliament or Royal Charter," (viz., the Society of Advocates in Aberdeen, the Faculty of Procurators of Glasgow, the Society of Solicitors-at-Law in Edinburgh, the Society of Writers in Paisley, the Faculty of Procurators and Solicitors of Dundee, the Society of Solicitors of Banffshire, and the Society of Procurators and Solicitors of Perthshire), "or other person to be appointed for the purpose by each such society, shall respectively prepare and deliver to the registrar certified lists containing the names and designations of all persons who then are members of such societies respectively, and the registrar shall enrol as a law agent every such person on his applying to be enrolled and grant to him a certificate of his enrolment."

(a) "4. The sheriff-clerk of each county shall, on or before the 1st day of February 1874, prepare and deliver to the registrar certified lists containing the names and designations of all persons admitted as procurators in the sheriff-court of the county previous to that date and not included in any of the lists delivered under the preceding section, and the registrar shall enrol as a law agent every such person on his applying to be enrolled, and grant to him a certificate of his enrolment."

"(b) Every enrolled law agent shall be deemed to be admitted, and, subject to the provisions of this Act with respect to stamp-duty and subscribing the roll of law agents appointed to be kept for the Court of Session and the several sheriff-courts respectively, shall be entitled to practise in any court of law in Scotland."—Sect. 2 of the Law Agents Act.

from and after 1st February 1874, no person can practise as an agent in the Court of Session or any sheriff-court without having subscribed the roll of agents practising before such court ;(c) and this he cannot do till he is enrolled.(d) It must be borne in mind that the mere delivery of a certified list containing an agent's name and designation does not constitute him an enrolled law agent : each individual agent must, after the delivery of the list containing his name, apply to the Registrar to be enrolled, and the Registrar is then bound to enrol him and grant a certificate of his enrolment on payment of a fee of two shillings and sixpence. An unenrolled law agent will not be entitled to practise in any court from and after 1st February 1874 ;(e) but if his name is in one of the certified lists, that will be sufficient warrant to the Registrar to enrol him at any time, and it is expressly provided that the Court, in admitting law agents in future, shall cause their names to be enrolled as such.(g)

(c) "From and after the first day of February 1874, no person shall be allowed to practise as an agent in the Court of Session or any sheriff-court until he shall have subscribed the roll of agents practising before such Court, or after his name shall have been struck off such roll, unless the name shall have been subsequently restored thereto."—Section 16 of the Law Agents Act.

(d) "12. A roll of the law agents practising before the Court of Session shall be kept by the clerk of the Lord President in such form as the Lord President may direct, and every enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent before the Court of Session shall be entitled to subscribe the said roll, and the said clerk shall be paid a fee of five shillings for each subscription, and every agent shall, on subscribing the said roll, deliver to the said clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same.

"13. A roll of agents practising in any sheriff-court shall be kept by the sheriff-clerk in such form as the Lord President of the Court of Session may direct, and every enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent before a sheriff-court shall be entitled to subscribe the said roll, and the sheriff-clerk shall be paid a fee of five shillings for each subscription, and every agent shall, on subscribing the said roll, deliver to the sheriff-clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same."

(e) Sect. 16, *supra*.

(g) Sect. 7.

CHAPTER II.

CERTIFICATE OR LICENSE TO PRACTISE.

Annual certificate required.

1. For nearly a century past every law agent has been obliged to take out annually a stamped certificate or license to practise, which must be recorded in a special register kept for the purpose. The statutes on the subject are very numerous, (a) but the matter is now chiefly regulated by the Stamp Act of 1870. (b)

Stamp Act of 1870, sect. 63.

2. By the 63d section of that statute it is enacted that every person required to take out a certificate to authorise him to practise in Scotland as a writer to the signet, solicitor, agent, or procurator, or in any part of the United Kingdom as a notary public, "shall yearly and every year, before he does any act in any of the aforesaid capacities, deliver to the commissioners, or to their proper officer, (c) in such manner and form as they shall direct, (d) a note in writing stating his full name and the place where he carries on his business, and thereupon, and upon payment of the proper duty, shall be entitled to such certificate, which is to be duly stamped and issued to him by the commissioners."

3. Before issuing any certificate to a person who has not previously had a like certificate, the commissioners are

(a) 25 Geo. III. c. 80; 37 Geo. III. c. 90; 39 and 40 Geo. III. c. 72; 44 Geo. III. c. 98; 48 Geo. III. c. 149; 55 Geo. III. c. 184; 6 Geo. IV. c. 46; 7 Geo. IV. c. 44; 9 Geo. IV. c. 49; 16 and 17 Vict. c. 63; 33 and 34 Vict. c. 97.

(b) 33 and 34 Vict. c. 97.

(c) Either to the Commissioners at the Inland Revenue Office, Edinburgh, or to the Distributors of Stamps of the district in which the applicant proposes to carry on business.

(d) In addition to the particulars specified in the Stamp Act, the applicant must state whether his first admission to act in any of the above characters has been within three years; and, if in partnership, the name of the firm; 9 Geo. IV. c. 49, sect. 6. Forms may be had on application, and one is printed in the Appendix to this treatise.

directed by the Procurators (Scotland) Act 1865, to require evidence that such person is either a writer to the signet, or a solicitor in the supreme courts, or a notary public, or a procurator duly admitted.^(e) That Act is repealed by the Law Agents Act of 1873 from and after 1st February 1874,^(g) but the latter Act declares that nothing therein contained shall interfere with the obligation of any law agent to obtain a stamped certificate.^(h)

Evidence required that applicant has been duly admitted.

4. If a certificate is taken out between the 31st of October and the 1st of December, it is dated 1st November: if taken out at any other time it is dated on the day on which it is issued.⁽ⁱ⁾ Agents ought, therefore, to take out their certificates before the 1st of December in each year; otherwise they will not be entitled to practise during the interval between the 31st of October and the date of their certificates. In all cases the certificates expire on the 31st of October next after their date.

Date of certificate.

5. By the schedule to the Stamp Act, the duty on certificates to be so taken out yearly by "every person admitted or enrolled in Scotland as a writer to the signet, solicitor, agent, attorney, procurator, or notary public," is £9 for persons carrying on business in the city or county of Edinburgh, if they have been admitted, or enrolled, or have carried on business for three years; if not for so long, then the duty is only £4, 10s. Persons practising in any other part of Scotland pay £6 if in practice for three years, or £3 if not so long. It is not necessary for any person to take out more than one certificate for any one year.^(k)

Amount of duty payable.

6. Certificates must be entered in a record kept for the city and shire of Edinburgh by an officer appointed by the Court of Session,^(l) or the sheriff-clerk of the sheriffdom within which the agent practises. The registrar marks on the back of the certificate the date of its being exhibited, and re-delivers it to the agent at the expiry of three days.

Certificate must be registered.

(e) 28 and 29 Vict. c. 85, sect. 3.

(g) 36 and 37 Vict. c. 63, sect. 25.

(h) 36 and 37 Vict. c. 63, sect. 23.

(i) Sect. 64 of the Stamp Act.

(k) Sect. 61 of the Stamp Act.

(l) Mr Francis S. Melville, New Register House, Edinburgh.

The registration must take place between the 31st of October and the 1st of December in each year, or before the agent begins to practise.(m)

Stamp Act
of 1870,
sect. 59.
Penalties
for failure
to take out
certificate.

7. The 59th section of the Stamp Act provides that every person who "directly or indirectly acts or practises in any court as an attorney, solicitor, proctor, writer to the signet, agent, or procurator, or as a notary public, without having in force at the time a duly stamped certificate," or who "on applying for any such certificate does not truly specify the facts and circumstances upon which the amount of duty chargeable upon his certificate depends, shall forfeit the sum of £50,(n) and shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity." It is farther provided that "any person in whose name, either alone or together with any other person, any proceeding is taken in any court, shall, unless the proceeding is set aside by the court as irregular, or unless the contrary is otherwise satisfactorily proved, be deemed to have acted in such proceeding."(o)

Uncertifi-
cated agent
not entitled
to decree
for expenses
in his own
name.

8. The similar provisions of former statutes have been held not only to bar an agent from suing his client for payment of judicial expenses incurred, and disbursements made, while he was without a certificate, but also to prevent him taking decree therefor in his own name against his client's opponent, when the latter has been found liable in the expenses of process.(p) But if the party found liable in expenses permits the agent of his opponent to take decree,

(m) 9 Geo. IV. c. 49, sect. 7.

(n) No penalty can be sued for in Scotland except by the Lord Advocate or an officer of stamps. The Commissioners of Stamps may reward informers. 44 Geo. III. c. 98, §§ 10 and 27. See also 33 and 34 Vict. c. 98, § 26.

(o) Prior to this enactment, it was held in an English case (*Edmonson v. Davis*, 1801, 4 Espinasse, 14) that when attorneys carried on business together, and their joint names were put on papers in causes in their office, each was liable to the statutory penalties for not taking out a certificate, even although one of them did not derive any profit or advantage from the suit.

(p) Cases *infra* (q).

he is barred, by the exception of competent and omitted, from thereafter suspending a charge for payment, on the allegation that the agent had no certificate.(g)

9. It has been held in several cases that when a party has been found entitled to expenses, the fact that his agent had not a certificate during the litigation cannot be pleaded as an objection to the approval of the auditor's report, or to decree being extracted in name of the party.(r) It is, however, to be observed that in these cases the objection was not taken till after the auditor's taxation; while the proper time to take the objection is when expenses are moved for,(s) or at the taxation of the account.(t) Where a party has, in ignorance of his agent's omission to take out a certificate, actually paid his account, it would be inequitable to deny him decree against an opponent who has been found liable to him in the costs of process.(u) But, on the

Taking decree in name of client.

(g) *Ewing v. Wallace*, 3 Feb. 1831, 9 S., 385, affirmed 13 Aug. 1833, 6 W. and S., 222; over-ruling the decision in *Campbell and Robertson v. Strachan*, 12 Feb. 1825, 3 S. 529 (N. E. 366) and 29 June 1826, 4 S. 772 (N. E. 780). See also *Barry v. Singer*, 8 July 1826, 4 S. 813 (N. E. 820).

(r) *M'Gown v. Begg*, 24 Jan. 1828, 6 S. 420; *Clyne v. Clyne's Tra.* 31 May 1837, 15 S. 1051; *Thomson v. Munro*, 28 Nov. 1838, 14 F. 99.

(s) *Urquhart v. Brown*, 21 Dec. 1833, 12 S. 271; over-ruled, as to the distinction between outlays and professional charges, by *Johnson v. M'Queen*, 11 March 1835, 13 S. 682.

(t) It has been held in England that the objection that an attorney is uncertificated comes too late, if it is taken after taxation of costs by the taxing master, who is entitled to disallow items incurred while the attorney has had no certificate; *Young v. Dowlman*, 1829, 3 Younge and Jervis, 24; *Punter v. Grantley*, 11 June 1841, 3 Manning and Granger, 295; *In re Angell*, 1848, 6 Dowling and Lowndes, 144; *Fullalove v. Parker*, 26 May 1862, 31 Law Journal, Common Pleas, 239.

(u) The English rule seems to be that a party is not deprived of his right to recover from his opponent costs actually paid to his attorney, by the fact that the latter is uncertificated. (*Reeder v. Bloom*, 22 April 1825, 3 Bingham, 9; *Young v. Dowlman*, 1829, 3 Younge and Jervis, 24; *Meekin v. Whalley*, 2 June 1834, 1 Bingham's New Cases, 59. See also Lush's Practice, 3d edition, p. 246.) In a recent case, where there was nothing to show whether or not a party had paid his solicitor, the opposite party was held not entitled to refuse to pay costs in which he had been found liable, on the ground that the solicitor was uncertifi-

other hand, it may be inferred that an agent whose account remains unpaid will not be permitted to evade the statute by arranging with his client to take decree in the latter's name.(x)

Agent conducting his own cause.

10. An uncertificated agent who has conducted a cause of his own, and been found entitled to expenses, cannot recover payment of professional charges, but only of actual outlays.(y)

Extrajudicial business.

11. The incapacity of an uncertificated agent under the Scotch statutes prior to the Stamp Act of 1870, has been held to relate only to charges for business in Court, or directly connected therewith,(z) proceedings in a judicial reference being regarded as proceedings in Court.(a) But the statutes do not bar an agent from recovering his outlays and professional charges for extrajudicial business, such, for example, as conveyancing or proceedings in an ordinary submission;(b) and when only an uncertificated agent has been employed, he has been allowed to charge for necessary business not directly connected with the conduct of litigation.(c)

cated; *In re Hope*, 31 July 1872, 7 Law Reports, Chancery Appeals, 766.

(x) *Ireland v. Wilson*, 25 June 1851, 13 D. 1226.

(y) *Stewart v. A. B.*, 16 May 1827, 5 S. 658 (N. E. 614); *M'Gown v. Baillie*, 6 March 1828, 6 S. 696; *Ireland v. Wilson*, 25 June 1851, 13 D. 1226. In the second of these cases doubts were expressed whether the statutory incapacity to sue was intended to apply to the case of an agent conducting a private suit of his own; but the point seems to be quite settled as above stated.

(z) *Gemmell's Exrs. v. Moon*, 14 Feb. 1838, 16 S. 505; See also *Richards v. Lord Suffield*, 11 July 1848, 2 Welsby Hurlstone and Gordon, 616, in which it was held that the 26th section of 6 and 7 Vict. c. 73, which incapacitates an attorney or solicitor from suing for fees or disbursements for or in respect of any business done by him as an attorney or solicitor, applies only to judicial proceedings.

(a) *Ireland v. Wilson*, 25 June 1851, 13 D. 1226. See also *Watson v. Stewart*, 24 Feb. 1872, 10 Macph. 494.

(b) *Gemmell's Exrs. v. Moon*, 14 Feb. 1838, 16 S. 505; *Taylor v. Forbes*, 13 Jan. 1853 (reported under date 8 Nov. 1861), 24 D. 19.

(c) *Darling v. Adamson*, 26 Nov. 1834, 13 S. 93. The session papers show that the items allowed by the Court were the following:—(1) draw-

12. By the 60th section of the Stamp Act of 1870 it is enacted that "every person who (not being a serjeant-at-law, barrister, or a duly certificated attorney, solicitor, proctor, notary-public, writer to the signet, agent, procurator, conveyancer, special pleader, or draftsman in equity), either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument(d) relating to real or personal estate, or any proceedings in law or equity, shall forfeit the sum of fifty pounds.(e) Provided as follows:—(1) This section does not extend to [a] Any public officer drawing or preparing instruments in the course of his duty: [b] Any person employed merely to engross any instrument or proceedings. (2) The term 'instrument' in this section does not include [a] Wills or other testamentary instruments: [b] Agreements under hand only: [c] Letters or powers of attorney: [d] Transfers of stock containing no trust or limitation thereof." This section, although applicable to Scotland as well as to England, does not seem to affect any practical alteration on the position of conveyancers in this country; for the exception of "agreements under hand only," i.e. not under seal, appears sufficiently wide to include most Scotch deeds.

Stamp Act of 1870, sect. 60. Conveyancing.

13. The effect of the various statutory provisions is not to extinguish the debt due to a law agent for business done by him while uncertificated, but only to bar his remedy, by rendering him incapable of suing for payment of his account,

Debt not extinguished, but remedy barred.

ing memorial to enable counsel to prepare appeal case to the House of Lords; (2) clean copy thereof; (3) perusing respondent's case, and writing observations thereon; (4) writing 25 letters, and various other small charges for trouble during the dependence of the appeal. No objection was taken to the repayment of disbursements. A charge for drawing answers to a petition was disallowed. See also *Ewing v. Glasgow Police Comrs.*, 14 Feb. 1837, 15 S. 553; but the session papers in this case do not show the nature of the charges allowed.

(d) The word "instrument" is declared in the interpretation clause to mean every written document.

(e) The similar provisions of the English statute 44 Geo. III. c. 98, have been held not only to impose a penalty on uncertificated conveyancers, but also to bar any claim for remuneration; *Taylor v. Crowland Gas and Coke Co.*, 16 June 1854, 18 English Jurist, 913.

or of obtaining decree for expenses in his own name. (g) This statutory incapacity, moreover, must be timeously pleaded, otherwise the objection may be held to have been waived. (h) Thus, if a bankrupt offering a composition to his creditors gives up in the state of his affairs an account due by him to a law agent, or admits it without objection to be reckoned in the creditors' acceptance of his offer, neither the bankrupt nor his cautioner can afterwards object to the account on the ground that the agent had no certificate; but a vague statement by the agent in a sequestration will not have this effect, such, for example, as an entry in the bankrupt's state of affairs that his law agent has a claim, "say for £40," as a deduction from the value of heritable property, the titles of of which are hypothecated. (i)

Effect on
other per-
sons of
agent's fail-
ure to take
out certifi-
cate.

14. Although there are no Scotch decisions in point, it cannot be doubted that the consequences of the neglect of an agent or notary public to take out a certificate are personal to himself, that is to say, that his acts are quite valid as far as other persons are concerned. (k) It is expressly provided by statute that no person who shall have regularly served any attorney, solicitor, proctor, writer to the signet, agent, procurator, or notary public, shall be prevented or disqualified from being admitted an attorney, &c., by reason of any omission of the person to whom he has served to take out his annual certificate. (l)

(g) It has been held in England that an uncertificated attorney or solicitor cannot be compelled to refund costs actually paid (*Nash v. Goode & Parry*, 1841, 9 Dowling, 929), and that he is entitled either to set off the debt, or to apply to its discharge money which is already in his hands. *In re Jones*, 4 Dec. 1869, 9 Law Reports, Equity, 63, and 39 Law Journal (Chancery) 83.

(h) See *ante*, sect. 9, as to the proper time to object to decree for expenses going out in the name of an uncertificated agent.

(i) 19 and 20 Vict. c. 79, sect. 143 (Bankruptcy Act); *Gemmell's Exrs. v. Moon*, 14 Feb. 1838, 13 F. 420, and 16 S. 505.

(k) This has been expressly decided by the English courts. *Holdgate v. Slight*, 25 Nov. 1851, 21 Law Journal, Queen's Bench, 74; *Sparling v. Brereton*, 12 March 1866, 2 Law Reports, Equity, 64. See also *Lush's Practice*, 3d edition, p. 246.

(l) 6 Geo. IV. c. 46.

CHAPTER III.

UNQUALIFIED PRACTITIONERS.

1. "In our courts of law questions are daily agitated which involve the property and the character, or it may be the liberty or the life, of the lieges. To the defence of these the instrumentality of agents is essential; their office necessarily implies a high trust, and imposes on them a corresponding obligation to the faithful discharge of their important duties. In this country, therefore, and, I believe, in every civilized state, the salutary rule prevails, for the protection of the public interest, that no man shall be allowed to practise as an agent before the Court until his qualifications have first been tried, and he is found fit for the office. The usurpation of the functions of an agent is an offence which the Court must severely reprobate, as one which would lead to the most mischievous consequences if not peremptorily checked."*(a)* Accordingly, no one is allowed to practise as an agent in any court without being duly admitted;*(b)* and the Law Agents Act provides that from and after 1st February 1874 no person shall be allowed to practise in the Court of Session or any sheriff-court until he has subscribed the roll of agents practising before such court, which he cannot do unless he has been duly admitted and enrolled under the provisions of the Act.*(c)*

Unqualified persons not allowed to practise in courts of law.

2. To this rule, however, two exceptions have been intro- Exceptions.

(a) *Per* Lord President Hope, in *A. B. v. C. D.*, 27 Feb. 1834, 12 S. 504.

(b) A. S. 21 Dec. 1833. As to the regulations of the English courts, see Pulling's *Law of Attorneys*, 5th ed., p. 519.

(c) 36 and 37 Vict. c. 63, §§ 12, 13, and 17.

duced by the Legislature, and these do not appear to be affected by the Law Agents Act. In the Small Debt Court a party may appear by a member of his family, or by such other person as the sheriff shall allow, such person not being an officer of court; (d) and in all actions under the Debts Recovery Act of 1868 the parties may be represented by any person *bona fide* employed by them in their usual business. (e)

Partnership
with un-
qualified
person.

3. There seems to be nothing to prevent a law agent entering into partnership or dividing the profits of litigation with an unqualified person, though the latter's name must not be used in judicial proceedings. (g) There is no doubt that arrangements may be lawfully made for settling the share of a deceased partner on his widow or representatives. (h) Bargains between town and country agents for the division of profits were formerly regarded as illegal; but all agreements between law agents acting for the same client to share fees or profits are now declared by the Law Agents Act to be lawful. (i)

Penalties
incurred by
unqualified
practi-
tioners.

4. An unqualified person practising in the Court of Session is liable to the severest penalties and the most rigorous punishment. (k) In one instance a person was fined £50, and ordained to be incarcerated till payment (the imprisonment not to exceed fourteen days) for having practised in court after being deprived of the office of agent on account of his misconduct. (l) In a subsequent case, the court merely censured an unqualified person for having acted as agent; but

(d) 1 Vict. c. 41, § 14.

(e) 30 and 31 Vict. c. 96, § 4. As to procurators-fiscal and agents for the various departments of the public service, see *ante*, p. 24.

(g) Paterson's Compendium of English and Scotch Law, p. 429; 33 and 34 Vict. c. 97, § 59. A different practice prevails in England, where every member of a legal firm requires to be duly qualified to act, by admission, enrolment, and certificate to practise; *Edmonson v. Davis*, 1801, 4 Espinasse, 14; *Tench v. Roberts*, 18 May 1819, 6 Maddock, 145; *In re Jackson*, 1823, 1 Barnewall and Cresswell, 270.

(h) This is also allowed by the law of England; *Candler v. Candler*, 22 June 1821, 6 Maddock, 141.

(i) 36 and 37 Vict. c. 63, § 21.

(k) A. S. 21 Dec. 1833, printed in Alexander's Abridgement, p. 423.

(l) Lord Advocate v. Hunter, 5 March 1833, 11 S. 514.

they intimated that any similar offence would in future be visited with exemplary punishment.(m)

5. An agent in the Court of Session authorising or permitting his name to be used by any unqualified person is guilty of contempt of court, and is liable to be suspended for any period not exceeding one year.(n) By the Procurators Act of 1865 it was provided that any procurator who should knowingly and willingly lend his name to enable any person who was not a procurator to practise as such might be summarily suspended from practice or struck off the register;(o) and although that Act is repealed from and after 1st February 1874, there can be no doubt that the Court of Session would be entitled, under section 22 of the Law Agents Act, to deal summarily with any practitioner in the sheriff-court who was guilty of such misconduct.(p)

Agent lending his name to unqualified person.

6. A person acting as agent in a court in which he is not entitled to practise cannot insist against his client for either remuneration or reimbursement;(q) and if he has not a duly stamped certificate he is farther liable to a penalty of £50.(r) When a party who has employed an unqualified practitioner has been found entitled to his expenses, the opposite party is not bound to pay the account incurred to such practitioner. In one case, in which the agent of the successful party was neither a certificated nor an admitted practitioner, the losing party was held liable for outlays.(s)

Unqualified practitioner not entitled to remuneration.

(m) A. B., 27 Feb. 1834, 12 S. 504. An unqualified person practising in the courts of England is liable to be indicted for a misdemeanour. *The Queen v. Buchanan*, 29 April 1846, 8 Adolphus and Ellis, Queen's Bench, 883; 6 and 7 Vict. c. 73, §§ 2, 35, and 36; 23 and 24 Vict. c. 127, § 6.

(n) A. S. 21 Dec. 1833. See also *Lord Advocate v. Hunter*, 5 March 1833, 11 S. 514.

(o) 28 and 29 Vict. c. 85, § 25. In England an attorney may be struck off the roll for knowingly permitting an unqualified person to practise as an attorney in his name; *In re Clarke and Others*, 13 June 1823, 3 Dowling and Ryland, 260.

(p) Under § 26 of the Law Agents Act the sheriff would probably be also entitled to deal with an agent lending his name to an unqualified person.

(q) *Johnson v. M'Queen*, 11 March 1835, 13 S. 682; *Winton v. Airth*, 17 July 1868, 40 Jur. 622, and 6 Macph. 1095.

(r) 33 and 34 Vict. c. 97, § 59.

(s) *Urquhart v. Brown*, 21 Dec. 1833, 12 S. 271.

But this decision seems to be overruled by the case of *Johnson v. M'Queen*, in which it was laid down, after a consultation of the Judges of both Divisions, that an unqualified practitioner in court cannot claim from his client even his outlays.(t)

Communi-
cations not
protected as
confidential.

7. Communications made to persons who are neither advocates nor professional agents do not appear to be entitled to the privilege of confidentiality.(u) But a person passing with a communication from a party to a professional agent will probably be considered as *eadem persona* with the agent.(x)

Party may
conduct his
own cause
under cer-
tain restric-
tions.

8. The rule prohibiting unqualified persons from practising as agents does not, of course, prevent a party from conducting his own cause. But this right is subject to various restrictions. As far as oral pleading is concerned, a party may conduct his own cause in any court.(y) In the inferior courts a litigant is also allowed to lodge papers signed by himself alone; (z) but he cannot borrow the process, though he may inspect it in the office of the clerk of court; (a) and it is not quite certain that he can take out a writ of summons.(b) In the Court of Session not only are parties

(t) *Johnson v. M'Queen*, 11 March 1835, 13 S. 682. In England a person acting as an attorney or solicitor without being duly qualified so to act is not entitled either to remuneration or reimbursement; 23 and 24 Vict. c. 127, § 6. See also *Prebble v. Boghurst*, 6 Aug. 1830, 1 Russell and Milne, 744; and the two following cases, pp. 746 and 748; *Humphreys v. Harvey*, 5 June 1834, 1 Bingham's New Cases, 62.

(u) *Wright v. Arthur*, 15 Dec. 1831, 10 S. 139; *Stuart v. Millar*, 29 May 1836, 14 S. 837, overruling *Gavin v. Montgomerie*, 17 Dec. 1830, 9 S. 213.

(x) *Gavin v. Montgomerie*, *supra* (u); Dickson on Evidence, §§ 1863-4. There are no Scotch decisions as to the validity of judicial proceedings carried on by unqualified practitioners; and the English cases appear to be contradictory. Lush's Practice, 3d ed., p. 246.

(y) Shand's Practice of the Court of Session, p. 78; Dove Wilson's Sheriff-Court Practice, p. 8.

(z) Dove Wilson's Sheriff-Court Practice, p. 8; *Jardine v. Simpson*, 27 Jan. 1823, Shaw's Justiciary Cases, 94.

(a) A. S. 10 July 1839, § 159.

(b) A. S. 10 July 1839, § 8; Dove Wilson's Sheriff-Court Practice, p. 8.

debarred from borrowing processes, (c) but papers signed by them alone cannot be received. (d) Every summons must be signed on each page by an agent entitled to practise in that court; and if such agent is not a writer to the signet, the last page must also be signed by a writer to the signet. (e) Every other paper lodged in process must be signed by an advocate, (g) with the single exception of defences, which may be signed by the defender alone. (h) The signature of counsel is, however, required by the Court merely to prevent the admission of informal or improper pleadings; and accordingly the objection that a paper is not signed by counsel may be obviated by signature at the bar. (i) In one case, leave was given to a party to apply to the Court if he could not get any advocate to sign a condescendence. (k) In proceedings in the Bill Chamber an agent's signature is sufficient. (l)

Unless a party who has conducted his own cause to a successful termination is a regular certificated practitioner, he is not entitled to recover from his opponent any other expenses than his actual disbursements. (m)

(c) A. S. 21 Dec. 1833.

(d) A. S. 19 Dec. 1710; A. S. 15 June 1738; A. S. 5 March 1789; A. S. 11 July 1828, § 112.

(e) Court of Session Act of 1868 (30 and 31 Vict. c. 100), § 13. A summons of valuation of teinds, &c., still requires to be signed by the teind clerk; *Matheson v. M. of Stafford*, 5 Feb. 1862, 24 D. 436.

(g) A. S. 19 Dec. 1710; A. S. 15 June 1738; A. S. 5 March 1789; A. S. 11 July 1828, § 112; *Davidson v. Paul*, 23 Feb. 1849, 11 D. 703; *Rennie v. Murray*, 12 Nov. 1850, 13 D. 36; *Denny v. M'Nish*, 16 Jan. 1863, 1 Macph. 258; *Watt v. Johnston*, 10 Jan. 1863, 1 Macph. 269; *Shand's Practice*, p. 78.

(h) *Davidson v. Paul*, 29 June 1848, 10 D. 1457, and 23 Feb. 1849, 11 D. 703. The exception does not extend to revised defences, which must be signed by counsel; *Jaffray v. Jaffray*, 19 Dec. 1863, 2 Macph. 355.

(i) *Watt v. Johnston*, 10 Jan. 1863, 1 Macph. 269.

(k) *Rennie v. Murray*, 12 Nov. 1850, 13 D. 36.

(l) *Scott v. Anstruther*, 18 Feb. 1848, 10 D. 732.

(m) *Black v. Carnegie*, 18 June 1814, 17 F.C. 655; *Stewart v. A. B.* 16 May 1827, 5 S. 658 (N. E. 614); *Urquhart v. Brown*, 21 Dec. 1833, 12 S. 271. The English rule is the same, though a reasonable allowance may sometimes be made for the party's loss of time. *Lush's Practice*, 3d edition, p. 896; *Pulling's Law of Attorneys*, 5th ed., p. 267.

Professional assistance may be obtained gratuitously.

9. These restrictions on the right of litigants to conduct their own causes might operate harshly in the case of persons in indigent circumstances, were it not that such persons are entitled to be placed on the poor's roll if they have a probable cause, and thus to obtain gratuitously the services of agent and counsel.⁽ⁿ⁾ In criminal proceedings, moreover, it is absolutely necessary that an agent be assigned to every person tried by jury, unless he expressly decline professional assistance; and persons tried before the High Court or the Circuit Court of Justiciary are entitled to the gratuitous services of counsel as well as of agents.^(o) A party accused of a crime is, however, not allowed to have legal advice before or during his examination, or to be represented by an agent when the witnesses are being precognosed by the procurator-fiscal.^(p)

Extrajudicial employment.

10. Law agents do not enjoy any monopoly in extrajudicial employment. There are, however, certain restrictions imposed by recent legislation on non-professional persons acting as conveyancers and furnished house-agents.

Restrictions on conveyancers who are not law agents.

Prior to 1870 any person was entitled to practise in Scotland as a conveyancer, and no certificate was required. But the Stamp Act of that year assimilated our law to that of England, by enacting that "every person who (not being a serjeant-at-law, barrister, or a duly certificated attorney, solicitor, proctor, notary public, writer to the signet, agent, procurator, conveyancer, special pleader, or draftsman in equity), either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceedings in law or equity, shall forfeit the sum of fifty pounds."^(q) As the Procurators Act of 1865 restricted the right to take out a

⁽ⁿ⁾ A. S. 10 July 1839, § 134; A. S. 21 Dec. 1842.

^(o) M'Glashan's *Sheriff-Court Practice*, 4th edition, p. 340; 2 Hume's Com., 283; 2 Alison, 370; Hannah and Higgins, 17th Sept. 1836, 1 Swinton, 289.

^(p) Fifth Report of the Commissioners appointed in 1868 to inquire into the Courts of Law in Scotland, p. 2.

^(q) 33 and 34 Vict. c. 97, § 60. The word "instrument" is declared in the interpretation clause to mean every written document.

certificate in future to writers to the signet, solicitors in the supreme courts, notaries public, and procurators, (r) the result is, that at the present moment only law agents and notaries public are entitled to act as conveyancers, except in the preparation of deeds specially exempted by the Stamp Act. These, however, are sufficiently numerous, viz.—(1) testamentary deeds of all descriptions; (2) agreements “under hand only,” *i.e.* not under seal (as Scotch deeds never are under seal this exemption appears to include every kind of contract); (3) letters of attorney; and (4) transfers of stock containing no trust or limitation. (s) The section of the Stamp Act above quoted has not yet been judicially construed in Scotland; but as it is of a penal character it will not be extended to cases which do not obviously fall within its terms. (t) As it applies only to those who draw or prepare deeds “for or in expectation of any fee, gain, or reward,” there is nothing to prevent any person drawing any deeds gratuitously. As has been already stated, the Procurators Act is repealed by the Law Agents Act from and after 1st February 1874; but it is declared by the latter Act that nothing in it contained shall interfere with the obligation of any law agent to obtain a stamped certificate. (u)

11. Persons acting as agents for selling or letting furnished houses exceeding the annual value of £25, are required, under a penalty of £20, to take out, between the 5th of July and the 5th of August in each year, a licence, for which they pay £2. But this provision does not extend to “any agent employed in the management of landed estates, or any attorney, solicitor, proctor, writer to the signet, agent, or procurator admitted in any court of law, or any conveyancer, who shall as such have taken out his annual certi-

Furnished-house agents must take out a license

(r) 28 and 29 Vict. c. 85, § 3.

(s) 33 and 34 Vict. c. 97, § 60. See also *ante*, Chapter II. sect. 12.

(t) The similar provisions of former English statutes have been construed favourably to uncertificated conveyancers; *Edgar v. Hunter*, 1817, Holt, 528; Tilsley's Treatise on the Stamp Laws, 3d edition, 84; Pulling's Law of Attorneys, 5th ed., p. 523.

(u) 36 and 37 Vict. c. 63, § 23.

Remuneration for extrajudicial employment.

ificate, or any auctioneer or appraiser, having in force a licence as such." (x)

12. An unqualified practitioner is not allowed to charge for extrajudicial work at a higher rate than a professional man. (y) In a recent case, where there was no express agreement as to remuneration, the court held that it must be calculated on the principle of *quantum meruit*, and not by any table of fees; and a remit was accordingly made to a man of skill to fix the amount. (z)

(x) 24 and 25 Vict. c. 21, §§ 10-13.

(y) Robb v. Kinnear's Trs., 21 June 1825, 4 S. 106. (N. E. 108).

(z) Winton v. Airth, 17 July 1868, 40 Jur. 622, and 6 Macph. 1095.

CHAPTER IV.

PRIVILEGES OF LAW AGENTS.

1. Under the provisions of the Law Agents Act, from and after 1st February 1874 no person will be able to practise as an agent in the Court of Session or in any sheriff-court unless he has been duly enrolled; (a) and an enrolled law agent is deemed to be admitted to every court of law in Scotland. (b) It is therefore unnecessary to describe the anomalous system which has hitherto existed in regard to the privileges of the different classes and societies of legal practitioners. (c) The present chapter is accordingly confined to the privileges of enrolled law agents, though the concluding sections refer to privileges which are not dependent on the mere fact of enrolment.

Former system of exclusive privileges now abolished.

2. Every law agent enrolled pursuant to the provisions of the Law Agents Act is deemed to be admitted to all courts of law in Scotland; but in order to practise in the Court of Session or any sheriff-court, from and after 1st February 1874, he must sign the roll of agents practising before such court; (d) and those who have paid only the stamp-duty

In what courts enrolled law agents may practise.

(a) Sects. 3, 4, 12, 13, and 16.

(b) Sect. 2.

(c) On this subject reference may be made to the Introduction to this treatise; to an article in the Journal of Jurisprudence, vol. xiii., p. 19; and to the following statutes:—6 and 7 Will. IV. c. 41, § 3; 6 and 7 Will. IV. c. 56, § 21; 1 and 2 Vict. c. 119, §§ 15 and 33; 19 and 20 Vict. c. 79, § 177; 21 and 22 Vict. c. 56; 30 and 31 Vict. c. 96, § 4; 31 and 32 Vict. c. 101, § 53; 33 and 34 Vict. c. 86.

(d) "Every enrolled law agent shall be deemed to be admitted, and, subject to the provisions of this Act with respect to stamp-duty and sub-

exigible on admission to practise in a sheriff-court are not qualified to sign the roll of agents practising in the Court of Session until they have paid an additional duty of £30.(e) These rolls are to be kept, in such form as the Lord President may direct, in the Court of Session by the clerk of the Lord President, and in each sheriff-court by the sheriff-clerk. Every agent is required to pay five shillings for each subscription, and to deliver a note specifying his place of business, and also a similar note as often as he changes his place of business.(g) An enrolled practitioner in the sheriff-court

scribing the roll of law agents appointed to be kept for the Court of Session and the several sheriff-courts respectively, shall be entitled to practise in any court of law in Scotland."—Sect. 2 of the Law Agents Act.

"16. From and after the first day of February eighteen hundred and seventy-four no person shall be allowed to practise as an agent in the Court of Session or any sheriff-court until he shall have subscribed the roll of agents practising before such court, or after his name shall have been struck off such roll, unless the same shall have been subsequently restored thereto."

(e) "17. An enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent in a sheriff-court shall be qualified to sign the roll of agents practising in the Court of Session on paying the difference between such duty and the duty chargeable on admission to practise in the Court of Session." See also § 12, quoted *infra*, and § 42 of the Stamp Act of 1870, and the schedule thereto under "Admission."

(g) "12. A roll of the law agents practising before the Court of Session shall be kept by the clerk of the Lord President in such form as the Lord President may direct, and every enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent before the Court of Session shall be entitled to subscribe the said roll, and the said clerk shall be paid a fee of five shillings for each subscription, and every agent shall, on subscribing the said roll, deliver to the said clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same.

"13. A roll of agents practising in any sheriff-court shall be kept by the sheriff-clerk in such form as the Lord President of the Court of Session may direct, and every enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent before a sheriff-court shall be entitled to subscribe the said roll, and the sheriff-clerk shall be paid a fee of five shillings for each subscription, and every agent shall, on subscribing the said roll, deliver to the sheriff-clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same.

"14. It shall be lawful for the Lord President of the Court of Session

who has not paid the additional duty exigible on admission to the Court of Session is entitled, not only to practise in any sheriff-court after subscribing the roll of such court, but also to practise in the Circuit Court of Justiciary, and to act as sole agent in any civil cause appointed to be tried by jury in any circuit town, under section 46 of the Court of Session Act of 1868.(*h*)

3. In causes and prosecutions brought or instituted under the Small-Debt Act, no law agent is allowed to appear for any party without leave of the sheriff upon special cause shown (unless the sheriff, considering that a case is unsuited for disposal in the small-debt court, remits it to his ordinary court); and such leave and the cause thereof require to be entered in the book of causes kept by the sheriff-clerk.(*i*) Unless such leave has been obtained, every party must appear personally, or by a member of his family, or by such other person as the sheriff shall allow, such person not being an officer of court.(*k*) Even where a law agent is permitted to appear on special cause shown, his fees do not appear to form a lawful charge against the opposite party, there being no mention made of them among the fees which

Agents excluded from Small Debt Court.

from time to time to issue rules and directions with respect to the keeping and subscription of the rolls directed to be kept by the two preceding sections, and such rules and directions shall be observed and obeyed by the several keepers of the said rolls.

"The name of any person shall be struck off the said rolls,—

"1. In obedience to the order of the Court, upon application duly made, and after hearing parties, or giving them an opportunity of being heard ;

"2. Upon his own written application."

(*h*) "At the trial of any civil cause at a circuit town, any agent qualified to practise in the sheriff-court of any county comprised within such circuit may attend such trial as sole agent in the cause, and shall be allowed for his attendance, and for all necessary business performed by him in connexion with such trial, the same fees as are allowed to agents in the Court of Session."—31 and 32 Vict. c. 100, § 50. The expenses allowed include the expenses of coming to Edinburgh to consult counsel before the trial ; *Anderson v. Edmond*, 14 July 1869, 7 Macph. 1050.

(*i*) 1 Vict. c. 41, §§ 14 and 17. See also A. S. 1 March 1861, § 2, printed in the Appendix to this treatise.

(*k*) 1 Vict. c. 41, § 32.

alone are to be allowed.(l) "Another view, however, is taken in some courts, and it is understood that small fees, fixed at the discretion of the sheriff, are allowed. When causes are remitted from the ordinary to the small-debt court, it is usual to allow the expenses of agents, although the authority for this is not altogether clear."(m)

Law agents
appearing
before arbi-
ters in sub-
missions.

4. It seems to be within the discretion of every arbiter either to allow law agents or counsel to appear before him and plead the causes of the parties to the arbitration, or to require the parties to appear *in propria persona*.(n) But where both the parties themselves wish to have the benefit of professional assistance, the arbiter ought not to refuse their request.(o) The agent of any of the parties, however, must not act as clerk to the submission.(p)

Law agents
acting as
advocates.

5. Only counsel, that is to say, members of the Faculty of Advocates, are entitled to act as advocates in the supreme courts, viz., the Court of Session, the Commission of Teinds, the High Court of Justiciary, and the Circuit Courts of Justiciary.(q) But an enrolled law agent may practise in the double capacity of advocate and agent in the Bill Chamber and all inferior courts in Scotland, viz., sheriff courts, commissary courts, burgh courts, admiralty courts, dean of guild courts, justice of peace courts, and all other courts of law having only local jurisdiction. Counsel are also entitled to practise in all these courts, but they are seldom employed in the sheriff courts, &c., except in important cases, in consequence of the rule generally adopted that fees paid to them cannot be allowed in taxations as between party and party, unless their employment is authorised or approved of by the sheriff.(r)

(l) 1 Vict. c. 41, § 32.

(m) Dove Wilson's Sheriff-Court Practice, p. 324.

(n) Mowbray v. Dickson, 2 June 1848, 10 D. 1102; Kirkaldy v. Dalgairns' Trs., 16 June 1809, 15 F.C. 318; Bell on Arbitration, p. 160.

(o) Bell on Arbitration, p. 160-1.

(p) Mowbray v. Dalgairns' Trs., 2 June 1848, 10 D. 1119 and 1124; Bell on Arbitration, p. 240.

(q) As to the signature of counsel to pleadings, &c., see *ante*, chapter iii., sect. 8.

(r) A. S. 2 June 1837; Tables of Fees of 11th March 1849. The

6. A law agent is not entitled to borrow a process depending before any supreme court sitting in Edinburgh unless he has a place of business in Edinburgh or Leith, nor a process depending before any inferior court unless he has a place of business within the jurisdiction of such court.^(s) The several counties united and to be united under the provisions of 33 and 34 Vict. c. 86, are, however, to be regarded as one sheriffdom and jurisdiction in so far as regards the powers, duties, rights, and privileges of the sheriff and his substitutes and the procurators of the sheriff-court; so that an agent who has a place of business within the united counties is entitled to borrow a process depending before any of the sheriff-substitutes. The object of the prohibition against agents borrowing processes depending in a court in whose jurisdiction they have no place of business is simply in order to have within the jurisdiction a person responsible for processes borrowed.^(t) There is therefore nothing to prevent a law agent having several places of business at the same time, or even to combine with other agents to have a single office for all. A higher rate of duty is, however, exigible on the annual certificates of agents who carry on business in the City or County of Edinburgh than on those of agents who practise in any other part of Scotland.^(u)

7. The duties of a notary public not being incompatible with those of a law agent,^(x) the two offices have been very

Borrowing
processes.

Law agents
may be ad-
mitted as
notaries
public.

sheriff may give his sanction either before or after the employment; Taylor v. Drummond, 9 Dec. 1848, 11 D. 223; A. S. 1 March 1861, art. 23.

^(s) "A law agent shall not be entitled to borrow a process depending before any supreme court sitting in Edinburgh unless he shall have a place of business in Edinburgh or Leith; and a law agent shall not be entitled to borrow a process depending before an inferior court unless he shall have a place of business within the jurisdiction of such court;" § 15 of the Law Agents Act. The former regulation on this subject was that only agents resident within the jurisdiction of the sheriff-court could borrow any process; A. S. 10 July 1839, § 159. The clerks and apprentices of qualified agents are, of course, entitled to borrow processes for them, and to grant the necessary receipts in their name; A. S. 21 Dec. 1833.

^(t) See *M'Arthur v. Philip*, 21 June 1823, 2 S. 416 (N. E. 371).

^(u) *Ante*, Chapter II. § 5.

^(x) It has been held that the duties of messenger-at-arms are incom-

frequently conjoined, and under the Law Agents Act any enrolled law agent may be admitted a notary public as a matter of course, and without being required to find caution on his admission. The mode of admission is by petition(y) to the Court of Session; and the stamp-duty payable on admission is at present £20.(z)

Title of law agents to object to admissions, &c.

8. Any enrolled law agent will probably be held entitled to object to the admission of improper persons as notaries or as law agents.(a) But the practitioners in a sheriff-court have no title to complain of the want of capacity of a sheriff-substitute.(b) They may, however, without the concurrence of or an assignation by their clients, sue for repetition of illegal fees charged by sheriff-clerks, but not for the infliction of penalties.(c)

Law agent may be admitted a solicitor in England after three years' service.

9. An enrolled law agent is entitled to be admitted as an attorney or solicitor in England, after serving under articles of clerkship in England or Wales to a practising attorney or solicitor for the term of three years, instead of the ordinary period of five years.(d) But as an articulated clerk is now

patible with those of a procurator in a sheriff-court; *Bowhill v. Sheriff of Berwick*, 2 June 1825, 4 S. 61 (N. E. 63).

(y) "Any enrolled law agent may apply to the Court to be admitted a notary public, and it shall be lawful for the Court to admit him and grant warrant to the keeper of the roll or register of notaries public to enrol him as a notary public on his paying the stamp-duty for the time exigible by law from a notary public on admission, and after the passing of this Act it shall not be necessary for any person to find caution on his admission as a notary public." Sect. 18 of the Law Agents Act.

(z) Schedule to the Stamp Act of 1870 (33 and 34 Vict. c. 97), under "Faculty."

(a) *Mitchell v. Gregg*, 7 Dec. 1815, 19 F.C. 46; *Procurators of Paisley v. Craig*, 8 Mar. 1823, 2 S. 283 (N. E. 249); *Sands v. Meffan*, 20 Jan. 1829, 7 S. 290.

(b) *Procurators of the Sheriff-Court of Glasgow v. Sheriff of Lanarkshire*, 6th June 1816, 19 F.C. 168. See also *Mackintosh v. Mackenzie*, 10th Nov. 1815, 19 F.C. 23, and 19 Mar. 1819, 1 Bligh, 272.

(c) *Murray v. Thomson*, 15 Dec. 1824, 3 S. 401 (N. E. 282). As to application for striking an agent's name off the rolls, see § 14 of the Law Agents Act.

(d) "Every person who has been admitted and enrolled as a writer to the signet, or as a solicitor in the supreme courts of Scotland, or as a

expressly prohibited from holding any other office or engaging in any employment other than that of clerk to his master, (e) he will probably be held to disqualify himself for admission in England by practising in the Scotch courts during the time of his service of clerkship. He ought, therefore, before entering into articles, to apply, under section 14 of the Law Agents Act, to have his name struck off the rolls of the Scotch courts.

10. "All writers to the signet practising as such, all solicitors practising before any of the supreme courts, all procurators practising before any inferior court, having severally taken out their annual certificates," are freed and exempted from being returned and from serving upon juries. (g) But a law agent who wishes to be thus exempted should not allow his name to be inserted in the jury list, as

Exemption
from serving
on juries.

procurator before any of the sheriff-courts of Scotland, and who, after being so admitted and enrolled has been bound by and has duly served under, articles of clerkship in England or Wales to a practising attorney or solicitor for the term of three years, and has been examined and sworn in manner directed by the first herein-before mentioned Act, and by this Act, may be admitted and enrolled as an attorney and solicitor; and service for any part of the said term not exceeding one year with the London agent of such attorney or solicitor in the proper business, practice, or employment of an attorney or solicitor, either by virtue of any stipulation, or with the permission of such attorney or solicitor, shall be and be deemed to have been good service under such articles for such part of the said term." 23 and 24 Vict. c. 127, § 15.

(e) "No person hereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever other than the employment of clerk to such attorney or solicitor, and his partner or partners (if any) in the business, practice, or employment of an attorney or solicitor, save as by the first herein-before mentioned Act or this Act otherwise provided; and every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove by the affidavit required under section fourteen of the first herein-before mentioned Act that he has not held any office or engaged in any employment contrary to this enactment, and the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for this purpose." 23 and 24 Vict. c. 127, § 10.

(g) 6 Geo. IV. c. 22, § 2. See also 55 Geo. III. c. 42, § 36; 31 and 32 Vict. c. 100, § 43; 32 and 33 Vict. c. 36.

it may be too late to claim exemption after he has been summoned to serve as a juror.

• Offices for which law agents are eligible.

11. Law agents are eligible for various legal offices, besides those that may be held by any other fit and competent persons. *(h)* The principal clerks of session must be advocates or writers to the signet of three years' standing, and after their appointment they do not practise in court. *(i)* The auditor of the Court of Session is required to be a writer to the signet or a member of the incorporated Society of Solicitors in the Supreme Courts of not less than three years' standing, and he must not practise either directly or indirectly as an agent before the Court of Session. *(k)* Any law agent of three years' standing may be appointed sheriff-substitute; but after his appointment he cannot act as an agent in legal, banking, or other business. *(l)* A procurator-fiscal may carry on business in civil courts; and there is no restriction on the auditors of sheriff-courts engaging in practice. *(m)* Sheriff-clerks and their deutes are strictly prohibited from practising, either directly or indirectly, before their courts; but it is specially provided by the Small Debt Act that a procurator, appointed a depute-clerk for a small debt circuit court, shall not be disqualified from acting as a procurator before any court, except the small debt court in which he so acts as depute-clerk. *(n)*

(h) Shand's Practice of the Court of Session, chapter iv.; M'Glashan's Sheriff-Court Practice, 4th ed. p. 74 *et seq.*; Dove Wilson's Sheriff-Court Practice, p. 6.

(i) A. S. 2 Nov. 1695, § 10; 1 and 2 Geo. IV. c. 38, § 9.

(k) 1 and 2 Geo. IV. c. 38, § 32.

(l) A. S. 6 March 1783; 6 Geo. IV. c. 23, §§ 9 and 10; 1 and 2 Vict. c. 119, § 5. See also *Macintosh v. Mackenzie*, 10 Nov. 1815, 19 F.C. 23; affirmed 9 March 1819, 1 Bligh, 272; Adam, 5 July 1824, S. Just. 117. A practising agent may apparently act as an honorary sheriff-substitute, provided he does not so act in any cause of his own; Dove Wilson's Sheriff-Court Practice, p. 5.

(m) Dove Wilson's Sheriff-Court Practice, pp. 7 and 9.

(n) A. S. 10 July 1839, § 160; 1 Vict. c. 41, § 25. See also *Hawthorn v. Fraser*, 14 Dec. 1799, M. Appx., Public Officer, No. 1; and *Smith v. Tasker & Robertson*, 27 June 1827, 5 S. 848 (N. E. 788). Where a sheriff-clerk is pursuer of an action in his own court, neither he nor his depute is entitled to officiate as sheriff-clerk in such action; the proper course is to

12. The largest and most lucrative part of the employment of law agents consists, in most instances, of extrajudicial work, such as conveyancing, the management of landed estates and house property, advising in trust and family matters, and attending to private bills in Parliament. Business of this kind is, however, not monopolised by law agents, but is largely shared by notaries public, accountants, house factors, and others.

Extrajudicial employment.

13. In the discharge of the duties which they owe to their clients, especially in the conduct of judicial proceedings, law agents necessarily enjoy very considerable immunities, and they are generally entitled to shelter themselves behind the plea of privilege in actions of damages brought against them by third parties for wrongful legal proceedings which they have taken on the instructions of their clients. The nature and extent of this protection will be found fully considered in other chapters, which treat of the liabilities of law agents to parties other than their clients. The exceptional security for their accounts which law agents enjoy will be found treated of in the chapters on their lien or hypothec on documents, and their preference or hypothec on costs.

Immunities and privileges treated of in other chapters.

14. The Law Agents Act has abolished all exclusive privileges relating to the actual conduct of litigation in particular courts; but it has still left the members of the Society of Writers to the Signet the exclusive privileges which they have hitherto enjoyed, not as law agents entitled to practise in the supreme courts, but as *quasi* officials of the Court of Session and clerks of the Keeper of the Signet. The following are now the only points in which writers to the signet enjoy higher privileges than other enrolled law agents:—1. They are members of the College of Justice; (o) but the privileges thence resulting have been gradually reduced till now they are purely nominal, amounting merely to exemption from watching and warding, from all the city

Additional privileges of Writers to the Signet.

apply to the sheriff to appoint a clerk to act in his stead in the particular process; *Macbeth v. Troy & Innes*, 8 Feb. 1873, 10 Scot. Law Rep. 255.

(o) A. S. 29 July 1637; 1661, c. 23; A. S. 23 Feb. 1687; Balfour's Practicks, p. 270.

imposts on goods carried to or from the city of Edinburgh and from the civil jurisdiction of the magistrates.(p) It seems uncertain whether members of the Society of Solicitors in the Supreme Courts are members of the College of Justice.(q) 2. A writer to the signet of ten years' standing may be appointed a judge of the Court of Session, provided he has, at least two years before his nomination, undergone a public and a private trial on Civil Law before the Faculty of Advocates, and been found qualified for the office;(r) but this privilege has long since gone into desuetude, as no one ever thinks of submitting to the necessary examination in the expectation of being appointed a judge two years thereafter. 3. A writer to the signet of three years' standing is eligible, along with members of the Faculty of Advocates, for the office of principal clerk of session.(s) 4. Seats in court are set apart for writers to the signet who are not actually engaged in causes which are being heard.(t) It may also be mentioned here, although it is not an exclusive privilege, that writers to the signet are entitled to wear gowns in court;(u) but it is only on rare occasions that they do so. 5. All writs passing the signet (except such as require to be signed by the clerk to the Teind court, or which may or must be signed by a clerk of court) must still be subscribed by a writer to the signet. The members of the Society had formerly the exclusive privilege of libelling and preparing summonses passing the signet on a bill, and of framing or revising the formal part of all other summonses.(x) But this privilege has been almost abolished by two recent statutes. The Court

(p) Bell's Law Dictionary, *voce* College of Justice.

(q) A. S. 23 Feb. 1687; *Mackintosh v. Brodie*, 17 June 1826, 4 S. 729; *Bruce v. Clyne*, 24 Jan. 1833, 11 S. 313.

(r) Treaty of Union, 1707, c. 7, article 19; 10 Geo. I. c. 19, § 1.

(s) A. S. 2 Nov. 1695, § 10.

(t) *Solicitors v. Writers to the Signet*, 27 Feb. 1824, 2 S. 753 (N. E. 626); affirmed 10 June 1825, 1 W. and S. 348.

(u) A. S. 14 June 1738; A. S. 23 June 1750.

(x) *Solicitors v. Clerks to the Signet*, 25 Feb. 1800, 16 F.C. 372, and M. Appx. College of Justice, No. 1.

of Session Act of 1850 rendered it no longer necessary for any summons to proceed upon a bill, and provided that all summonses in consistorial or other causes, which at the date of its passing required to be signed by a clerk of court, might be signed either by such clerk or by a writer to the signet;^(y) and the Court of Session Act of 1868 enacted that "Summonses passing the signet shall continue to be signeted as at present, but they may competently be signed by any agent entitled to practise before the Court of Session: Provided that in the event of such agent not being a writer to the signet, the summons shall be signed on the last page only by a writer to the signet in testimony of its being written to the signet, and any writer to the signet shall, on a fee of 2s. 6d. being tendered to him, be bound so to sign any summons which may be presented to him for that purpose, but he shall not by so signing incur any responsibility."^(z) 6. The signature of a writer to the signet is still required to minutes in the Bill Chamber for warrants to imprison, and minutes by assignees for authority to arrest, charge, poind, or imprison, proceeding on decrees or acts of the supreme courts.^(a) 7. The most valuable of the exclusive privileges still remaining to writers to the signet is that of preparing the drafts of proposed Crown-charters or writs, and signing the relative papers which require to be lodged with the presenter of signatures.^(b) But the value of this privilege has greatly diminished since 1833, as charters from the Crown are no longer applied for merely for the purpose of creating votes.

^(y) 13 and 14 Vict. c. 36, §§ 18 and 15.

^(z) 31 and 32 Vict. c. 100, § 13. The signature of the teind clerk is still required to a teind summons; 1707, c. 9; *Matheson v. Marchioness of Stafford*, 5 Feb. 1862, 24 D. 436.

^(a) 1 and 2 Vict. c. 114, §§ 6 and 7 (Personal Diligence Act); 31 and 32 Vict. c. 54, § 2 (Judgments Extension Act).

^(b) 31 and 32 Vict. c. 101, §§ 64 and 72. See also 10 and 11 Vict. c. 51, § 2.

CHAPTER V.

APPOINTMENT OR RETAINER OF LAW AGENTS.

Appointed
like ordi-
nary agents.

1. Except in matters regulated by the forms of procedure in Court, the appointment of law agents is governed by the general law applicable to the appointment of ordinary agents or factors. (a)

Cannot be
appointed
by incapaci-
tated per-
sons.

2. No valid appointment, therefore, can be made by persons incapable of entering into a contract, such as idiots, lunatics, and pupils. (b) Thus, a law agent carrying on proceedings in name of an insane person is regarded as acting without authority, and is consequently liable in expenses, unless fairly justified by the circumstances of the particular case. (c) The insanity of a client, however, if of short duration, does not necessarily operate the recall of an agent's employment. (d) The guardians of incapacitated persons may, of course, employ factors and law agents when their services are required. (e)

Appoint-
ments by
minors.

3. There is nothing to prevent a minor *pubes* appointing a law agent, either by himself alone if he has no curators, or with their consent if he has. (g) It must, however, be remembered that the deeds of a minor are subject to reduction

(a) Pulling's Law of Attorneys, p. 85; and Story on Agency, § 6.

(b) Reid v. Duff, 19 Jan. 1839, 1 D. 400; Lindsay v. Watson, 14 June 1843, 5 D. 1194. See also Rankine v. Rankine, 1 July 1825, 4 S. 127 (N. E. 128).

(c) M'Call v. Sharp, 31 Jan. 1862, 24 D. 393; Bryce v. Graham, 26 May 1826, 2 W. & S. 481; and 23 July 1828, 3 W. & S. 323.

(d) Wink v. Mortimer, 8 March 1849, 11 D. 995.

(e) Fraser on Parent and Child, p. 268; Ersk. i. 7. 16.

(g) Stair i. 6. 36; Fraser on Parent and Child, pp. 336, 372, and 565; Bell's Lectures on Conveyancing, p. 107; Nasmith v. Nasmith, 12 Nov. 1624, M. 4046.

within the *quadriennium utile*, on the ground of minority and lesion.

4. A married woman may, even without her husband's consent, validly appoint a law agent; but, of course, she cannot authorise him to do any act which she is herself incapacitated from doing, and it is only in certain exceptional circumstances that she is liable in payment of his account. *(h)*

Appoint-
ments by
married
women.

5. Writing is not essential to the constitution of the contract of law agency; and in practice a formal authority is seldom asked or given. *(i)* But an agent who does not take a written mandate from a client voluntarily undertakes the *onus* of proving employment if it should be denied. *(k)* When it is intended to confer upon a law agent special powers beyond the scope of his usual employment, written authority is sometimes absolutely necessary, and ought never to be dispensed with by the agent; *(l)* and, on the other hand, a client entering into an agreement with a law agent, that the latter is to give his services gratuitously, or to charge outlays only unless costs are recovered from the opposite party in a litigation, ought to obtain from the agent a written acknowledgment to that effect. *(m)*

Mode of ap-
pointment.

6. There are, moreover, certain cases in which a written mandate is required by the rules of judicial procedure. They are as follows:—

Cases in
which a
written
mandate is
required in
judicial pro-
ceedings.

1. When a party, whether a native or a foreigner, is out of Scotland, an agent is not entitled to carry on legal pro-

(h) See *post*, Chapter IX. sect. 16 *et seq.*

(i) Bankton i. 18. 3. 6; Nasmith, 10 Dec. 1776, M. 8492, and *voce* Mandate, Appx. No. 1; Bell v. Ogilvie, 18 Dec. 1863, 2 Macph. 61.

(k) "Every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it; and he ought to do this both for his own sake and for the sake of his client. It is much better for him, because it gets rid of all difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard and prevent them being drawn into law-suits without their own express direction." *Per* Lord Tenterden in *Owen v. Ord*, 18 Oct. 1828, 3 Carrington & Payne, 349.

(l) See Bell's Lectures on Conveyancing, p. 420; and Chapter VII.

(m) Taylor v. Forbes, 13 Jan. 1853, 24 D. 19; Bell v. Ogilvie, 18 Dec. 1863, 2 Macph. 336; Scotland v. Henry, 19 July 1865, 3 Macph. 1125.

When client
is out of
Scotland.

ceedings in his name, unless authorised by a written mandate, (n) either from the party himself or from a factor duly authorised. (o) This rule, it may be parenthetically observed, is quite distinct from the regulation that an absent person must sist a mandatory responsible for the proper conduct of litigation and liable for such expenses as may be awarded. (p) Authority once given to a law agent is presumed to continue, so that when a party leaves the kingdom *pendente lite*, it is unnecessary for him to grant a mandate to continue the proceedings. (q) The want of written authority is not necessarily fatal to the validity of the proceedings if a mandate be subsequently obtained. Thus, when a petition for interdict was presented in name of the wife and law agent of a party who was abroad, against a *brevi manu* encroachment on his property, and on his return he homologated the proceedings, a preliminary defence founded on the want of a mandate was repelled. (r) In another case, a law agent having raised an action in name of a client who was abroad and ignorant of the proceedings, the Lord Ordinary dismissed the action for want of a mandate; but before a reclaiming note was advised, a mandate was produced homologating the whole proceedings and authorising the action, and the Court held that the objection to the title to insist was thereby cured. (s) In exceptional circumstances the Court will

(n) Bankton iv. 3. 25; Balfour's Practicks, p. 292; Stuart, 3 Feb. 1681, M. 353; M'Bean v. Innes, 22 Feb. 1827, 2 W. & S. 528; and 2 March 1827, 5 S. 505 (N. E. 475). See also Dundas v. Ferguson, 20 July 1780, M. 8837; and Davidson v. Elphinstone, 6 July 1802, M. 8842.

(o) Whyte v. Maxwell, 1 June 1850, 12 D. 955; Smith v. Harris, 3 March 1854, 16 D. 727. See also Kerslake v. Clarke, July 1820, More's Notes to Stair, p. 6; and Shotton v. M'Neill, 11 June 1834, 12 S. 705.

(p) See Shand's Practice, p. 162.

(q) E. of Melville v. E. of Perth, 10 Feb. 1693, M. 355; E. of Marchmont v. Home, 7 June 1715, M. 358. See also Hobson v. Foster, 22 Jan. 1814, Hume, 408. On the other hand, when a litigant who has gone abroad *pendente lite* is ordained to sist a mandatory, his opponent is entitled to demand that a mandate signed by the mandant be produced; Gunn & Co. v. Couper, 22 Nov. 1871, 10 Macph. 116.

(r) Ross v. Fisher, 28 Feb. 1838, 11 S. 467.

(s) Wylie v. Adam, 5 Feb. 1836, 14 S. 430.

even sist process to afford an opportunity of procuring a mandate.(*t*) It will generally be sufficient if a mandate is granted and produced before an action is called in Court; but in such a case inhibition ought not to be used on the dependence ;(*u*) though, where the will of the summons does not contain a warrant of inhibition,(*v*) it is sufficient that a mandate be obtained before the signeting of letters of inhibition.(*x*) A law agent who carries on litigation without a written mandate, when he has reasonable cause to know that his client is abroad, renders himself liable to the opposite party for the expenses of process.(*y*)

2. In the inferior courts a law agent appearing for a defender is required to produce, along with his defences, either a written mandate or the copy of citation given to the defender ;(*z*) but this rule is not very rigorously enforced in most sheriff-courts.(*a*) Without written authority, however, a practitioner in the sheriff-courts can neither propone impropation(*b*) nor bind a client to a reference to his opponent's oath.(*c*)

3. An agent subscribing a petition for service requires a special mandate in writing.(*d*)

4. Petitions for sequestration in the Court of Session must be signed by the petitioner or his counsel or agent, and in the sheriff-court by the petitioner or his agent; and in either court, in petitions at the instance of the debtor, but not signed by him, there must be produced therewith a mandate authorising the same, signed by him, or, in the case of a company, by a party entitled to act for the company.(*e*)

(*t*) *Murray v. Murray*, 8 July 1845, 7 D. 1000.

(*u*) *Kyd v. Ferguson*, 11 March 1826, 4 S. 549 (N. E. 557). See also *Paterson v. Alexander*, 15 Dec. 1629, M. 343.

(*v*) 31 and 32 Vict. c. 100, § 18.

(*x*) *E. of Caithness v. Eaton*, 5 July 1836, 14 S. 1091.

(*y*) *Baillie v. Abercromby*, 5 July 1796, Hume, 492.

(*z*) A. S. 10 July 1839, § 30.

(*a*) *Phillip v. Gordon*, 5 Dec. 1848, 11 D. 175.

(*b*) A. S. 10 July 1839, § 91.

(*c*) A. S. 10 July 1839, § 84.

(*d*) 31 and 32 Vict. c. 101, § 29.

(*e*) 19 and 20 Vict. c. 79, § 21. As to mandates by creditors to vote

How man-
dates should
be authen-
ticated.

7. A mandate to conduct judicial proceedings ought to be either holograph or tested, though this does not seem to be absolutely necessary. *(g)* In any case, it is sufficient if it be authenticated according to the forms of the country in which it is granted. *(h)* In a question between agent and client, a mandate plainly improbate—for example, signed only by a mark—may be taken along with other circumstances as an element in proving employment. *(i)*

Does man-
date require
to be
stamped?

8. Prior to the Stamp Act of 1870, a mandate to conduct judicial proceedings did not require to be stamped; *(k)* and, although the provisions of that Act may be reasonably held to impose a duty of 10s. on such a mandate, *(l)* the general practice following upon the statute has sanctioned the opposite construction. *(m)*

in sequestrations, see § 63 of the Bankruptcy Act; *Turnbull v. Smellie*, 1 March 1828, 6 S. 676; *Paul v. Gibson*, 13 Feb. 1834, 12 S. 431; *Dyce v. Paterson*, 19 Dec. 1846, 9 D. 310; 34 Vict. c. 4, § 4.

(g) *Scudamore v. Lechmere*, 3 June 1797, M. 8559 and 16,138. In *Bonny v. Gillies*, 13 Nov. 1829, 8 S. 13, a mandate was objected to on the double ground that it was improbate and insufficient, being applicable only to an inferior court process. The objection was sustained, but neither the report nor the session papers show whether the former ground was regarded as sufficient by itself. In a case in the sheriff-court of Elgin it was recently held by the sheriff-substitute that a mandate to sue an action does not require to be holograph or tested; *Cruickshank v. Murdoch*, 13 Sept. 1864, 3 Scottish Law Magazine (N. S.) 150. See also *Thompson v. Parochial Board of Inveresk*, 30 Nov. 1871, 10 Macph. 178.

(h) *Great Northern Railway Co. v. Laing*, 24 June 1848, 10 D. 1408.

(i) *Bryan v. Murdoch*, 13 Nov. 1824, 3 S. 282 (N. E. 198); affirmed 28 May 1827, 2 W. and S. 568.

(k) *Scudamore v. Lechmere*, 3 June 1797, M. 8559 and 16,138; *Ellis v. Connel*, 26 June 1822, 1 S. 528 (N. E. 486); *Cruickshank v. Murdoch*, 13 Sept. 1864, 3 Scottish Law Magazine (N. S.) 150.

(l) 33 and 34 Vict. c. 97.

(m) See *Stewart v. Gelot*, 19 July 1871, 9 Macph. 1057. In a recent case, which is not reported, in the Small-Debt Court of Aberdeen, Mr A. F. Wright, advocate, as mandatory for a party who had gone to New York, sued Mr Corbett, New Deer, for £10, 15s. The agent for the defender took objection to the mandate not being stamped; and it is understood that the objection was sustained by the sheriff-substitute (*Dove Wilson*).

CHAPTER VI.

EVIDENCE OF APPOINTMENT OR RETAINER.

1. Our institutional writers, following the analogy of the Civil Law, treat the contract implied in the employment of a professional man as a branch of *mandate* or gratuitous commission, a fee being regarded as a *honorarium*, even in cases where it may be sued for without a previous agreement. (a) But as an agent's right to remuneration is now considered to be *inter essentialia* of the contract, law agency may be more properly regarded as the letting to hire of skilled labour—a species of *locatio-conductio operarum*. (b) The distinction is, however, of no practical importance; and legal phraseology is more in accordance with the old than with the modern theory. “The relation of agent and client is in general constituted without any written contract, and without any special contract, either written or verbal. The mere acceptance of employment creates that relation—a relation carrying with it certain well-known consequences, without any necessity for expressing them. The agent on the one hand engages that he possesses the requisite skill, and will employ it with all due diligence in the client's service; and the client, on the other hand, becomes bound to

Nature of
the Contract
of Law
Agency.

(a) Bankton, i. 18. 1. 2; Stair, i. 12. 5; Ersk. iii. 3. 32.

(b) Cullen v. Baillie, 20 Feb. 1846, 8 D. 511; affirmed 19 June 1855, 18 D. (H. L.) 40, and 2 Macq. 80; Taylor v. Forbes, 13 Jan. 1853, 24 D. 19; Goodsir v. Carruthers, 19 June 1858, 20 D. 1141; Richardson v. Merry, 19 June 1863, 1 Macph. 940; Bell v. Ogilvie, 18 Dec. 1863, 2 Macph. 336; Winton v. Airth, 22 Jan. 1868, 6 Macph. 1095; 1 Bell's Com. 459; Pothier, Traité du Contrat de Mandat, § 125.

supply funds for disbursements, and to pay the agent at the proper time reasonable remuneration for his services. These correlative obligations are all implied, unless any of them be expressly dispensed with.(c)

It may be proved *prout de jure*.

2. Whether law agency is to be regarded as a branch of mandate or as a species of *locatio-conductio operarum*, it is a consensual contract; and it may therefore be proved *prout de jure*, that is to say, by all the legal means of probation, —parole, documentary, oath of party, and circumstantial evidence.(d)

Questions raised either between party and party, or between agent and client.

3. The necessity of proving an agent's employment has generally arisen either from a party disclaiming legal proceedings which have been carried on in his name, or from an alleged client denying his liability for payment of the agent's account. The legal presumptions and the sufficiency of the proof of employment vary according as the question is raised between party and party or between agent and client.

Rules applicable to questions between party and party. Mandate presumed from appearance of counsel.

4. The following is a summary of the rules applicable to questions between the parties to a law-suit:—

1. When a party is within Scotland, a mandate by him is presumed from the mere appearance of an advocate in his cause;(e) and the opposite party is not entitled to require the production of any written authority.(g) The circumstance that a party has not authorised proceedings in which he has been represented by counsel, does not exempt him from liability for costs to his opponent; but he is entitled to relief against those who have used his name without authority.(h)

(c) *Per* Lord Justice-Clerk Inglis, in *Bell v. Ogilvie*, *supra*.

(d) *Bell's Prin.* §§ 16 and 219; *M'Alister v. Gemmill*, 17 May 1862, 24 D. 956; affirmed 23 Feb. 1863, 1 Macph. (H. L.) 1; *Boswell v. Selkrig*, 9 March 1811, Hume, 350; *Dickson on Evidence*, § 567. See also *Cornie v. Grigor*, 23 May 1862, 24 D. 985.

(e) *Bankton*, i. 18. 1. 7. and iv. 3. 26; *Stair*, i. 12. 12.; *Ersk.* iii. 3. 33; *Ballantine v. Edgar*, 7 Dec. 1676, M. 348; *Grant v. Mackenzie*, 11 Dec. 1678, 2 Brown's Sup. 237; *Maxwell v. Chalmers*, 1 Dec. 1750, M. 12,042; *Millar v. Gibson-Craig*, 29 Nov. 1826, 5 S. 52 (N. E. 49); *Dickson on Evidence*, § 570.

(g) *Hamilton v. Marshall*, 25 Nov. 1813, 17 F.C. 467, Hume, 497; *Cowan v. Fairnie*, 4 March 1836, 14 S. 634.

(h) *Thomson v. Candlemakers of Edinburgh*, 23 May 1855, 17 D. 774.

An advocate, however, who appears *bona fide* for a party at the request of a practising agent is not responsible for the consequences of the agent's having acted without authority.⁽ⁱ⁾ As regards the merits of unauthorised proceedings, it is incompetent for a party to suspend a decree obtained in a process in which an agent and counsel have appeared for him; the only mode in which he can substantiate an averment of want of authority seems to be by reduction of the decree, but the competency of even this remedy is by no means clear.^(k)

2. When an agent alone appears for a party, there is generally, in the absence of proof to the contrary, a slight presumption that he has been duly authorised.^(l) But in the inferior courts there is no implied mandate in favour of a law agent, unless he produces a writ importing a warrant;^(m) and a decree of an inferior court may be suspended on the allegation that the suspender never authorised appearance to be made for him.⁽ⁿ⁾

Appearance
by agent
alone.

3. When an action is carried on nominally by one person, but really by another who has the substantial interest in the litigation, the opposite party is not bound to know of such an arrangement, and is therefore entitled, if successful, to decree for expenses against the nominal party.^(o)

Nominal
parties in
litigation.

(i) *Wallace v. Miller*, 31 May 1821, 1 S. (N. E.) 44, foot-note.

(k) *Maxwell v. Chalmers*, and *Hamilton v. Marshall*, *supra*. See also *Cowan v. Fairnie*, 4 March 1836, 14 S. 634; and *Bayly v. Buckland*, 3 July 1847, 16 Law Journal, Exchequer, 204.

(l) *Souter v. Mackintosh*, 20 May 1859, 21 D. 835. The question in this case was whether a party had been represented at the examination of witnesses whose evidence had been taken to lie *in retentis*; and the presumption above stated was held to apply. But in *Mackenzie v. Macartney*, 13 Sept. 1831, 5 W. and S. 513, Lord Brougham observed—"A statement that a certain individual was present at a meeting as agent for another, though embodied in a formal minute, is not evidence of his agency."

(m) *Ersk.* iii. 3. 33; *Chalmers v. Tinwald*, 24 Nov. 1665, M. 12,247; *Law v. Smith*, 6 Dec. 1678, 2 Brown's Sup. 237; *King v. Seton*, 10 Jan. 1694, M. 12,247; *Dewar v. Reid*, 11 Dec. 1832, 11 S. 193; *Menzies v. Caldwell*, 21 June 1834, 12 S. 772; A. S. 10 July 1839, § 30.

(n) *Dewar v. Reid*, and *Menzies v. Caldwell*, *supra* (m); *Philip v. Gordon*, 5 Dec. 1848, 11 D. 175.

(o) *Dickie v. Brash*, 25 Jan. 1838, 16 S. 353; *Ramsay v. Smail*, 7 July 1840, 2 D. 1336.

Proof of
employment
in questions
between
agent and
client.

5. It is impossible to lay down any abstract rules regarding the proof of employment in questions between agent and client, but what is contained in this and the six following sections may be taken as a summary of the decisions on the subject:—

Possession
of client's
writings.

“Procurators before inferior courts, or agents before the Lords of Session, having possession of the parties’ writings, are tacitly empowered to act for them in business to which these writings relate.”(p) The strongest presumption arises from the agent’s possession of the service copy of citation,(q) such possession being a sufficient mandate to maintain defences to an action, and also, in the case of a country procurator, to employ an agent in Edinburgh.(r) Even when the service copy of a summons has been delivered to an agent, not by the nominal defender, but by a party who has the substantial interest in defending the action, the legal presumption of employment by the nominal party is so strong that it can be redargued only by proof that the agent knew that the nominal party was not his employer.(s) Similarly, the transmission of a current bill to a law agent is an implied mandate to do diligence when it shall become due.(t) The possession, however, of a bill marked paid, but without a special receipt, is no authority to raise action on it, the legal presumption being that such a bill has been retired by the true debtor.(u) The indirect transmission of a party’s title-deeds to a law agent does not imply a mandate to defend an action of reduction of the deeds.(x)

Party hav-
ing an in-
terest in a
cause.

6. The mere fact that a party has an interest in a cause, or has benefited by the services of an agent, is not sufficient to

(p) Bankton, i. 18. 1. 7, and iv. 3. 25. See also Ersk. iii. 3. 33, and Pothier, *Traité du Contrat de Mandat*, § 129.

(q) A. S. 10 July 1839, § 30.

(r) *Megget v. Milne*, 17 June 1828, 6 S. 981.

(s) *Dickie v. Brash*, 25 Jan. 1838, 16 S. 353; *Muir v. Stevenson*, 24 Jan. 1850, 12 D. 512.

(t) *Murray v. Durne*, 6 Dec. 1797, Hume, 323; *M'Donald v. Kelly*, 5 July 1821, 1 S. 105 (N. E. 102); *Macara v. Philips*, 9 Dec. 1825, 4 S. 296 (N. E. 299).

(u) *Jackson v. Williamson*, 9 Dec. 1825, 4 S. 292 (N. E. 296).

(x) *Kerr v. Little*, 19 May 1831, 9 S. 610.

infer employment. Thus, cautioners for payment of a composition are not liable to an agent employed by the bankrupt to defend him, although the employment may have been beneficial to them;(y) and persons who have allowed their names to be used as members of a provisional committee of a projected railway company, and attended meetings, but who have not personally authorised or homologated the employment of an agent, are not liable in payment of his account.(z) But whenever a party has an interest in an action, his employment of the agent conducting it will be readily inferred from other facts and circumstances;(a) and if an action has been brought or defended for the benefit and through the intervention or tacit permission of a party, he is bound to pay the expenses of it.(b)

7. A person may lend his name in carrying on an action without necessarily incurring liability to the agent employed. Thus, the cautioners for a bank agent, who was in arrear to the bank on bills discounted by him, having employed a law agent to take legal proceedings against the proper obligants on the bills, and the bank having allowed the cautioners to carry on the proceedings in its name, it was held that the law agent had no claim against the bank for payment of his account.(c) It sometimes happens that when an action is raised against the purchaser of a property, he calls on the seller to defend it, as being liable to him in absolute warranty: in such circumstances the fact that the purchaser is the nominal defender will not render him liable to the agent employed, even though he has assisted in the management of the process.(d) The principle regulating all such cases

Nominal
party to
action.

(y) *Wallace v. Murdoch*, 25 June 1828, 6 S. 1018.

(z) *Campbell v. Lauder's Reps.*, 27 Nov. 1852, 15 D. 117.

(a) *Campbell v. Gray*, 29 May 1821, 1 S. 37; *Young v. M'Gill*, 28 May 1823, 2 S. 346 (N. E. 303); *Bryan v. Murdoch*, 13 Nov. 1824, 3 S. 282 (N. E. 198), affirmed 28 May 1827, 2 W. and S. 568. See also *Wilson v. Dick & Son*, 2 Dec. 1868, 6 Scot. Law Rep. 148.

(b) *M'Donald v. Ross*, 19 July 1820, 2 Bligh 547; *Carrick v. Manford*, 26 Jan. 1854, 16 D. 410. See also *Watson and Stotts v. E. of Selkirk*, 20 Feb. 1817, 19 F.C. 304.

(c) *Paterson v. Paisley Union Bank*, 16 Nov. 1837, 16 S. 71.

(d) *Scott v. Donaldson*, 8 Dec. 1831, 10 S. 107.

has been thus briefly stated:—"If an agent knows that, in whatever name proceedings are conducted, the nominal party is not his true employer, and that the proceedings are conducted by him for behoof of another, he must look to that other alone for his reimbursement, and not to the nominal party;"(e) and, on the other hand, when a person in whose name proceedings are conducted acts so as to lead the agent to believe him to be the true employer, he will not be allowed to escape liability on the plea that he was not really interested in the proceedings.(g)

Liability for
another's
law-suit.

8. A person may render himself liable for the expenses of another's law-suit, not only by express agreement,(h) but also by his conduct generally.(i) "By a course of conduct, if strong and decisive, one may become liable even for the expense of another man's law-suit. If, for instance, he is a near relative of the party, corresponds with and instructs the agent, assumes the management of the business,—in short, raises a reasonable expectation of his responsibility, and thus becomes *dominus litis*,—he must answer to the agent accordingly, though he never have expressly promised him payment, or engaged him as agent, or gave him direct authority to proceed on his credit."(k) Thus, a person assuming the management of a poor man's law-suit, and corresponding with the agent on the subject, was found liable for the expenses incurred by the nominal party, about whom the agent knew nothing whatever.(l) But in one case it was held insufficient to subject a party to liability for his son that he had accompanied him to an agent in order to make explanations regarding his son's business, although one of the purposes for which he visited the agent was to secure, if possible, advances which he had made to his son.(m) In the same

(e) *Per* Lord Mackenzie, in *Dickie v. Brash*, 25 Jan. 1838, 16 S. 353.

(g) *Grant v. Wishart*, 17 Jan. 1845, 7 D. 274.

(h) See *Manderson v. M'Minn*, 16 Feb. 1802, Hume, 90, where an improbate cautionary obligation to pay part of the expenses of an action was found effectual in respect of the consequent institution of the action.

(i) *Stevens v. Burden*, 21 Nov. 1823, 2 S. 507 (N. E. 447).

(k) *Robinson v. Ross*, 5 July 1814, Hume 352.

(l) *Robinson v. Ross*, *supra*.

(m) *Gray v. Turner*, 8 Dec. 1857, 20 D. 246.

case, the agent having rendered mixed accounts for both father and son, and the father having given him an assignation by the son, in order that the agent might pay himself the part of the account due by the latter, the father was held not liable for expenses incurred in vainly attempting to make the assignation effectual.

9. A person paying part of an account incurred by another party will generally be regarded as a joint employer, and will consequently be liable for the whole amount unless he has explicitly limited his responsibility.⁽ⁿ⁾

Liability from paying part of account.

10. When legal proceedings originally instituted in name of one party have been adopted by another, the latter will generally be liable for the previous expenses. Thus, a trustee for creditors is not entitled to avail himself of proceedings carried on by the bankrupt without being liable for the expenses of them.^(o) And where several proprietors had entered into an agreement to defray the expenses of an action in regard to fishings in which they were interested in respect of their estates, one of them, who purchased the estate of another and took the benefit of the proceedings in relation thereto, was held liable in payment of a corresponding share of the agent's account.^(p) In one case, however, where a resolution had been carried at a meeting of heritors not to take part in a litigation, but a contrary resolution had been passed at a subsequent meeting, it was doubted whether the heritors were liable for the expenses incurred before the date of the second meeting.^(q)

Adoption of proceedings instituted by others.

11. Legal proceedings for which no authority was originally given may be homologated by a party either expressly or tacitly, in which case he becomes liable for the whole ex-

Homologating unauthorised proceedings.

(n) *Grant v. Wilson*, 30 May 1804, Hume, 336; *Pattison v. Roy*, Blunt, &c., 28 Nov. 1845, 18 Jur. 88.

(o) *Paterson v. McLelland*, 4 June 1824, 3 S. 103 (N. E. 68).

(p) *Watson and Stotts v. E. of Selkirk*, 20 Feb. 1817, 19 F.C. 304.

(q) *Mackintosh v. Harkness*, 25 June 1841, 3 D. 1093. See also *Wilson v. Young*, 12 July 1851, 13 D. 1366.

(r) *Wylie v. Adam*, 5 Feb. 1836, 14 S. 30. Reference may also be made to the English cases noted in Pulling's Law of Attorney, 5th edition, p. 93.

pense of them.(r) A party is presumed to tacitly homologate legal proceedings carried on in his name, if he does not disclaim them as soon as they come to his knowledge.(s) In one case, Scotch agents without authority from their client instructed London solicitors to conduct an appeal in the House of Lords, and the client, on becoming aware of this, did not communicate with the London solicitors, repudiating the proceedings, but entered into an arrangement with the Scotch agents that they should relieve him of the expenses; but the Court held that in a question between him and the London solicitors he must be regarded as having adopted the proceedings, whatever claim of relief he might have against his Scotch agents.(t)

Proof of special agreements as to liability.

12. As it is only nominate contracts that can be proved *prout de jure*,(u) the preceding observations are not applicable to agreements between agents and clients releasing either of the parties from such obligations as are *inter essentialia* of the contract of law agency. It has, however, been held that it does not change the contract from nominate to innominate for a trustee employing a law agent to stipulate that he is not to be personally liable except to the extent of the agent's outlays; and such a condition has, therefore, been allowed to be proved *prout de jure*, by way of exception to an agent's claim for professional charges.(x) It not unfrequently happens that an agent conducts an action for a client, on the understanding that he is not to claim anything beyond outlays unless he recovers expenses from the opposite party; and whether such a condition may be competently proved by parole evidence is a question attended with difficulty, the decisions on the subject being somewhat conflicting. In the first cases in which arrangements of this kind were brought under the cognisance of the Court, no question was raised as to the mode of proof, the agreements

Agreement to charge outlays only.

(s) Wallace v. Miller, 31 May 1821, 1 S. 40 (N. E. 43).

(t) Robertson v. Foulds, 9 Feb. 1860, 22 D. 714. See also Hamilton v. Thomson, 21 Oct. 1868, 6 Scot. Law Rep. 14.

(u) Ersk. iv. 2. 20; Edmonston v. Edmonston, 7 June 1861, 23 D. 995; Thomson v. Fraser, 30 Oct. 1868, 7 Macph. 39.

(x) Scotland v. Henry, 19 July 1865, 3 Macph. 1125.

being clearly proved by the agent's own letters.(y) In a subsequent case the existence of an agreement to charge only outlays was inferred by the Court on construing the correspondence between the parties and the agent's state of accounts.(z) In later cases the agents pleaded the incompetency of parole evidence, sometimes successfully and sometimes unsuccessfully; and the only principle that can be inferred from these decisions is that the mode of proof depends on the manner in which the question is raised on record. In one case, the client, having pleaded prescription, and denied that the account was due, deponed on a reference to his oath that he had employed the agent only on the express condition that he was not to be liable for either outlays or business charges; and the Court held that the oath proved a contract totally subversive of the claim sued for.(a) In another case, in which an agent sued for payment of his account, the defender admitted having employed him to perform the business charged for, but averred that it was an express condition of the employment that the agent's claim against him should be restricted to outlays; and it was held that the condition could be proved only by the writ or oath of the pursuer.(b) But in referring to this case Lord Benholme has observed:—"If the pursuer had been put to prove his case, which would have been the proper way of conducting the case, I think he never could have prevented the defender from ascertaining by cross-examination or by conjunct probation the full nature and effect of the contract."(c) In a later case, in which the defender pleaded prescription, the Lord Ordinary (Ormidale) sustained that plea, and held that the defender's writ was insufficient to prove that he was liable in more than outlays; but when the case came into the Inner House, a joint minute was lodged, by which the

(y) *Clyne v. Swanson*, 26 Jan. 1830, 8 S. 391; *Swanson v. Robertson*, 14 June 1833, 11 S. 718.

(z) *Bayne v. Steele's Reps.*, 16 Nov. 1836, 15 S. 22.

(a) *Knox v. McCaul*, 8 Nov. 1861, 24 D. 16.

(b) *Taylor v. Forbes*, 13 Jan. 1853, 24 D. 19.

(c) In *Scotland v. Henry*, 19 July 1865, 3 Macph. 1125.

defender withdrew the plea of prescription, and both parties agreed to hold the correspondence produced as the proof in the cause; and on a review of the whole correspondence, the Court held that there was no express stipulation releasing the client from the implied obligation to remunerate his agent.(d)

(d) Bell v. Ogilvie, 18 Dec. 1863, 2 Macph. 336.

CHAPTER VII.

EXTENT OF LAW AGENTS' AUTHORITY.

1. When a law agent has been once duly appointed, he does not require to get fresh authority from his client at every stage of his proceedings, a certain amount of authority and discretionary power being necessarily implied in the mere fact of his employment. The extent of an agent's implied authority depends in each case on the nature of the work which he has been employed to perform; and the legal presumptions on the subject vary according as the question is raised between an agent or a client and third parties, or between agent and client.

General
authority of
law agents.

2. As long as a law agent does not exceed the limits of the authority actually conferred upon him, his acts are binding on his clients. But as he is only a limited agent, no one is entitled to rely on him as holding a general authority.^(e) His implied authority, however, extends to the doing of everything that is usual and necessary for the accomplishment of the work that he has been employed to perform.^(g) The question of implied authority appears to be regarded as in most cases one of mixed fact and law, but

Nature of
implied au-
thority in
questions
with third
parties.

(e) Bell's Prin. § 219; *Forbes' Exrs. v. Western Bank*, 9 March 1854, 16 D. 807.

(g) *Macara v. Phillips*, 9 Dec. 1825, 4 S. 296 (N. E. 299); *Sanderson v. Campbell*, 17 May 1833, 11 S. 623; *Union Bank of Scotland v. Makin & Sons*, 7 March 1873, 10 Scot. Law Rep. 301; 2 Kent's Com. 618; *Story on Agency*, §§ 58 and 60; *Lush's Practice*, 3d edition, p. 250; *Richardson v. Daley*, 1838, 4 Meeson & Welsby, 384; *Regina v. Lichfield Town Council*, 6 May 1847, 16 Law Journal, Queen's Bench, 333.

never as a pure question of fact to be determined by a jury alone.(h)

Citation.

3. When a summons or other writ requires to be executed, or where service is ordered on a party, this must be done on the party himself, and not on his agent.(e) But in practice a defender's known agent frequently agrees to hold a summons as executed.(g) Such a dispensation, however, should be accepted only in *personal* actions, where the agent's authority and responsibility are unquestionable.(h) In the Court of Session an agent accepting service generally produces a mandate authorising him to do so; and this is imperative in the case of an agent accepting service of a petition on behalf of a client.(i) But in the sheriff-court this is not customary, though written authority to dispense with citation would, of course, have to be produced, if the pursuer called for it.(k)

When a defender or respondent is out of Scotland, inti-

(h) *Cameron v. Mortimer*, 18 June 1872, 10 Macph. 817. In a recent English case (*Lovegrove v. White*, 26 May 1871, 6 Law Reports, Common Pleas, 440, and 40 Law Journal, Common Pleas, 253), the presiding judge expressed an opinion that an attorney employed to sue for a debt in a county court had no implied authority, after judgment in favour of his client, to enter into an agreement with the debtor to delay enforcing it for some time; but although there was no evidence of express authority, he allowed the case to go to the jury on the question, among others in dispute, whether the attorney had authority to enter into the arrangement. The Court allowed a new trial on the ground of misdirection by the presiding judge in not ruling that the attorney had no authority to bind his client by entering into the agreement.

(e) *Cullen v. Campbell*, 8 Dec. 1829, 8 S. 197.

(g) *Wilson v. Pattie*, 27 May 1826, 4 S. 623 (N. E. 631). Where an agent who was asked whether he would accept service on behalf of a client returned an equivocal answer, the client was held not entitled to his expenses, though successful, in a suspension of the decree obtained on this citation; *Cullen v. Campbell*, *supra*.

(h) See *Campbell on Citation*, p. 67; and *Parker on Adjudication*, p. 20.

(i) Order of 11 Jan. 1859; *Thoms on Judicial Factors*, p. 361. As to entail petitions, see A. S. 23 Dec. 1848; A. S. 22 May 1849; *Duncan's Entail Procedure*, chapter 21; and *Campbell on Citation*, p. 99.

(k) *Dove Wilson's Sheriff-Court Practice*, p. 59. See also *Shand's Practice*, 262.

mation is sometimes required to be made to his known agent in Scotland, if he has any, in addition to edictal citation.(l)

4. When a party has once appeared in Court by an agent, the agent is the proper person (so long as he continues to act)(m) to receive all notices required to be given in the ordinary course of the litigation.(n) The employment of an agent to execute the diligence of imprisonment has even been held to give him an implied power to receive intimation from the prisoner in a process of aliment under the Act of Grace, equivalent to intimation to the incarcerating creditor who resided at a distance.(o)

Incidental
intimations
in litigation.

5. When a party chooses to appear in court by a law agent, or by both counsel and agent, it is absolutely necessary that he should be bound by their management of his cause, whatever remedy he may have against them if they abuse his confidence.(p) It is accordingly within the implied authority of every legal practitioner, not only to bind his client by admis-

General
conduct of
litigation.

(l) In Entail Petitions, "where the party called is furth of Scotland, he shall be allowed 60 days from the date of service for answering the petition, and service shall be made in the way and manner prescribed for services in lieu of the previously subsisting forms of edictal service by the Act 6 Geo. IV. c. 120, and relative Act of Sederunt in the matter; and intimation shall also be made by the petitioner's agent to such party's known agent in Scotland, if he has any known agent there, and a certificate shall be produced in process, signed by the petitioner's agent, stating either that such intimation has been made, or that the party has no known agent in Scotland."—A. S. 23 Dec. 1848, § 2. No edictal citation against a defender, who has a known residence or place of business in England or Ireland, is sufficient, unless (in addition to such edictal citation) "reasonable notice of the summons or other writ to be served be given either to the defender's known agent in Scotland, if he any have, or to the defender himself, at his residence or place of business within England or Ireland."—A. S. 18 Dec. 1868. But a party appearing in the Court of Session cannot now state objections to the regularity of the execution or service of the summons or other writ whereby he is convened; 31 and 32 Vict. c. 100, § 21. See also *Hamilton v. Monkland Co.*, 19 March 1863, 1 Macph. 672; and *D. of Atholl v. Robertson*, 9 Jan. 1872, 10 Macph. 298.

(m) *Ritchie v. Aitchison*, 21 Jan. 1848, 10 D. 454.

(n) *Shand's Practice*, pp. 300 and 511; *M'Glashan's Sheriff-Court Practice*, 4th edition, p. 189. See also *Pulling's Law of Attorney*, p. 105.

(o) *Mackenzie v. M'Lean*, 14 Jan. 1830, 5 F. 258, 8 S. 306.

(p) See *Haller v. Worman*, 24 Jan. 1861, 3 Law Times, 741.

sions on record, (g) but also to exercise his own discretion in the general conduct of litigation. (r) Counsel and agents acting together are, however, invested with a larger discretionary power than agents acting alone, as they generally do in the inferior courts. For when authority has been given to counsel to conduct a cause, his mandate covers all acts of discretion in the mode of conducting it, and binds his client in all questions with the opposite party, (s) special authority not being required even in the case of such extraordinary steps as entering into a judicial reference, (t) or compromising the cause, (u) or giving up the case in the course of a

(g) Dickson on Evidence, § 1386 *et seq.* and § 1470 *et seq.*; *Young v. Wright*, 21 Dec. 1807, 1 Campbell 140; *Wagstaff v. Wilson*, 1832, 4 Barnewall and Adolphus, 3. Judicial admissions are, however, binding on the parties only in that action in which they are made; *Wauchope v. North British Railway Co.*, 17 Dec. 1863, 2 Macph. 326.

(r) *Brown v. Dunlop and Hamilton*, 26 Dec. 1699, 4 Br. Sup.; *Chown v. Parrott*, 4 May 1863, 32 Law Journal, Common Pleas, 197. As to waiving irregularities, see *Jamieson v. Binns*, 5 May 1836, 4 Adolphus and Ellis, 945; and *Backhouse v. Taylor*, 21 Jan. 1851, 20 Law Journal, Queen's Bench, 233.

(s) *Mackintosh v. Fraser*, 20 Jan. 1860, 22 D. 421, and 16 April 1863, 1 Macph. (H.L.) 37. See, however, *Bankton*, iv. 3. 30, as to a reference to oath.

(t) *Bailie, &c. (Clyne's Trs.) v. Edinburgh Oil Gas Co.*, 27 Aug. 1835, 2 S. and M'L. 243, and 3 Clark and Finelly, 639; *Forbes v. Lord Duffus*, 19 Jan. 1837, 12 F. 321; *Mackenzie v. Girvan*, 9 March 1843, 2 Bell's App. 53. Counsel in England have the same power; *Russell on Arbitration*, 4th edition, p. 26.

(u) *Gilfillan v. Brown*, 8 March 1833, 11 S. 548. This was an action of damages in which, after a jury was sworn, the counsel for the parties signed an agreement that neither party should insist for a verdict or for judgment in that action, or in certain other relative proceedings, and to submit the question of expenses to a referee; and the jury were then discharged. One of the defenders having thereafter given notice of trial, on the ground that counsel had no authority to enter into a compromise or reference, the Court discharged the notice of trial, holding that the agreement was within the powers of counsel, though holding no special mandate or authority. The balance of the English authorities seems to be rather in favour of counsel's power to compromise an action, provided he is in full knowledge of all material circumstances; but in the cases of *Swinfen*, undernoted, a conflict arose between the Courts of Common Law and those of Equity, the latter holding, in somewhat exceptional circumstances, that counsel was not entitled to compromise an action con-

trial.(x) On the other hand, an agent acting alone has no implied power to submit to arbitration a process which he has been employed to conduct;(y) and a practitioner in the sheriff-court can neither propone improbation,(z) nor bind his client to a reference to oath, without written authority,(a) though he has power to consent to the revival of an action which stands dismissed under the Sheriff-Court Act of 1853.(b)

6. Whether an agent acting alone has ever an implied power to compromise an action or claim is a question attended with difficulty, as it has never been positively decided in Scotland.(c) In the cases undernoted(d) it seems to

Compromise
of action.

trary to his client's express instructions. *Furnival v. Bogle*, 11 Dec. 1827, 4 Russell, 142; *In re Hobler*, 12 Nov. 1844, 8 Beavan, 101; *Swinfen v. Swinfen*, 11 June 1856, 25 Law Journal, Common Pleas, 303; 12 January 1857, 26 Law Journal, Common Pleas, 97; 10 Nov. 1837, and 22 April 1858, 27 Law Journal, Chancery, 35 and 491; *Swinfen v. Chelmsford*, 8 June 1860, 5 Hurlstone and Norman, 890; *Thomas v. Harris*, 20 April 1858, 27 Law Journal, Exchequer, 353; *Chambers v. Mason*, 5 July 1858, 28 Law Journal, Common Pleas, 10; *Prestwick v. Poley*, 9 May 1865, 34 Law Journal, Common Pleas, 189; *Strauss v. Francis*, 23 April 1866, 1 Law Reports, Queen's Bench, 379. See also Russell on Arbitration, 4th edition, p. 27, and cases *infra* as to power of agent acting without counsel to enter into a compromise.

(x) *Currie v. Glen*, 19 Dec. 1846, 9 D. 308.

(y) *Livingstone v. Johnston*, 23 Feb. 1830, 8 S. 594; Bell on Arbitration, pp. 116 and 266. In England an attorney can bind his client by referring a cause to arbitration; and if in so doing he exceeds his actual authority, the remedy of the client is only against him; Redman on Arbitrations, p. 11; Russell on Arbitration, 4th edition, p. 24; *Faviell v. Eastern Counties Railway Co.*, 26 May 1848, 17 Law Journal, Exchequer, 297; *Smith v. Troup*, 17 April 1849, 18 Law Journal, Common Pleas, 209.

(z) A. S. 10 July 1839, § 91.

(a) A. S. 10 July 1839, § 84. See also *Hardie v. Allan*, 4 Jan. 1709, M. 12,248, and the two subsequent cases; *Dickson on Evidence*, § 1566; and Bankton iv. 3. 30.

(b) 16 and 17 Vict. c. 80, § 15; *Mackintosh v. Mackintosh*, 10 Nov. 1863, 2 Macph. 48. See also *Wilson v. Stewart*, 24 Feb. 1872, 10 Macph. 494.

(c) It has been observed by Lord Chancellor Brougham that the attendance of the defender's agent at the taxation of the pursuer's account in an undefended action, and his getting the form of the decree modified, will not make it a decree *in foro*, unless his authority, if denied, he proved; *Wilson & M'Lellan v. Sinclair*, 7 Dec. 1830, 4 W. and S. 398.

(d) The question was first raised in *Cornie v. Grigor*, 23 May 1862, 24

have been assumed that a compromise is not within the implied mandate of an agent employed merely to conduct

D. 985, in which the pursuer alleged that the defender, a procurator in the sheriff-court, had without authority appeared for her and consented to a compromise, in accordance with which decree for £40 had been pronounced against her. The opposite party in the sheriff-court process and his agent, who were also called as defenders, allowed decree of reduction and damages to be pronounced against them in absence. The Court allowed the pursuer a proof before answer, the result of which was to show that her agent was sufficiently authorised to compromise the action by the letters of her daughter and of a third party who had acted as a medium of communication between agent and client; 30 Jan. 1863, 1 Macph. 357. In *Orr v. Meikle and Smith* (6 July 1867, 39 Jur. 557, and 4 Scot. Law Rep. 235) the Lord Ordinary (Kinloch) was of opinion that it was not within the implied mandate of an agent, employed to defend an action in the sheriff-court, to enter into an agreement to state no defence but to submit to decree. The Court, however, after some discussion remitted to the Lord Ordinary to allow the parties a proof of their averments; and, on the proof being reported, held that the correspondence instructed that the agent had acted under the authority of his client. In a recent case, which is not reported (*Cordiner v. Webster, March and May 1873. Act. Millie; Alt. Asher. Agents, Thos. Lawson, S.S.C., and Stuart & Cheyne, W.S.*), a party having instructed a procurator to raise an action in the sheriff-court of Aberdeenshire for payment of £300 in name of damages for personal injuries, the defenders, who admitted their liability, but disputed the amount, lodged a minute offering £42 in full of all the pursuer's claims, and consigned the amount. This tender was at once accepted by the pursuer's procurator, although his instructions were not to accept anything less than £250, and that only in the event of the defenders agreeing to settle without legal proceedings being taken against them. To this tender and acceptance the sheriff interposed his authority, and granted warrant accordingly to the clerk of court to pay to the pursuer the sum consigned, and *quoad ultra* assoilzied the defenders. When this compromise was communicated to the pursuer he at once repudiated it, and employed other agents to raise an action of reduction of the sheriff's decree, on the ground that it "proceeded upon a minute of tender and acceptance thereof by a party who had no authority to grant the same." To this action, which was called before Lord Jerviswoode, and afterwards transferred to Lord Shand, certain preliminary pleas were stated in defence; but the defender's counsel is understood not to have maintained that a procurator had any implied authority to bind his client by a compromise. The preliminary pleas having been repelled, a proof was led, from which it appeared that the procurator had no express authority to enter into the compromise. Thereafter the pursuer agreed to accept £100 in full of all claims; and the action was thus compromised without the judgment of

litigation in the sheriff-court. These cases, however, are not directly applicable to agents practising in the Court of Session, or to agents employed in the general management of their clients' affairs; and considering the more recent English decisions on this subject, there seems to be ground for maintaining that such agents have an implied power to bind their clients to a *bona fide* and reasonable settlement of a claim or action, although they may be liable in damages to their clients in the event of their disregarding their instructions, or exceeding the authority actually conferred upon them.(e) And now that the Law Agents Act has raised

the Inner House having been obtained. See also Balfour's Practicks, p. 300; and *Graham v. Graham*, 5 March 1823, 1 S. App. 365.

(e) In *Fray v. Voules* (3 May 1859, 1 Ellis and Ellis, 839, 28 Law Journal, Queen's Bench, 232) an attorney who compromised an action under the advice of counsel, but against the express directions of his client, was held liable to an action of damages at the instance of the client. But Lord Campbell observed:—"An attorney retained to conduct a cause is entitled in the exercise of his discretion to enter into a compromise, if he does so reasonably, skilfully and *bona fide* (as the defendant is to be taken as having done), provided always that his client has given him no express directions to the contrary; but where these directions have been given, such a step, though perhaps binding as between him and third parties, is *ultra vires* as between him and his client." Again, in *Chown v. Parrott* (4 May 1863, 14 Scott, Common Bench, N. S., 74, and 32 Law Journal, Common Pleas, 197) it was held that an attorney retained to defend an action is not guilty of actionable negligence by entering into a compromise without the consent of his client, provided he acts *bona fide* and with reasonable care and skill, and the compromise is made for the benefit of the client, and not in defiance of his express prohibition. It was there observed by Erle, C. J.:—"I apprehend the rule of law is well established that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client is because the attorney is his general agent for that purpose. I think that is established in *Fray v. Voules*." In the next case (*Prestwick v. Poley*, 9 May 1865, 18 Scott, Common Bench, N. S., 806, and 34 Law Journal, Common Pleas, 189) the plaintiff having employed an attorney to sue for the price of a piano, and the cause having proceeded as far as the joinder of issue, the attorney, on finding that the defendant was unable to pay, agreed to settle the action on condition that the piano should be returned and the costs be paid by instalments by the defendant. The plaintiffs having repudiated this arrangement, the Court held that it was within the general scope of the attorney's authority, and binding as

practitioners in the sheriff-courts to practically the same position as practitioners in the supreme courts, it cannot be absolutely asserted that a compromise is in all cases beyond the implied authority of the former. Till the whole question has been reconsidered in the light of the recent English decisions and of the Law Agents Act, it must be regarded as unsettled by the law of Scotland. But whatever view may be taken of the abstract legal principle, very slight evidence of authority will be regarded as sufficient in a question between the client and the opposite party.(g)

between the plaintiffs and the defendant; and all the judges expressed opinions to the effect that the general retainer of an attorney gives him authority to compromise an action. In the last English case on this subject (*Butler v. Knight*, 22 Jan. 1867, 2 Law Reports, Exchequer, 109) a lady had employed an attorney to raise an action of damages for breach of promise of marriage, in which a verdict was obtained for £300, with costs amounting to £90. She gave him no formal instructions to continue to act for her in enforcing the judgment, but immediately after the trial directed him not to compromise the matter. But the attorney, having reason to believe the defendant was in insolvent circumstances, entered into a compromise by which he agreed to accept £100 from the defendant's brother in full of his client's claims. The lady, however, repudiated the arrangement, and brought an action of damages against her attorney, in which the jury gave her a verdict for £50 if she could still enforce the verdict in the former action, and for £300 if she could not enforce it. The Court held that she could not enforce it, but considered that the damages awarded her in that event were excessive, and, on the lady consenting to that course, reduced them to £150. Finally, in two very recent cases, the Irish Courts have held that a client is bound by a compromise entered into by an attorney in violation of his express directions, if the opposite party has not had notice of the prohibition to enter into any compromise; *Brady v. Curran*, 24 Jan. 1868, 2 Irish Reports, Common Law, 314; and *Berry v. Mullen*, 5 June 1871, 5 Irish Reports, Equity, 368. See also Lush's Practice, 3d edition, p. 250; Addison on Torts, 4th edition, p. 404; and Pulling's Law of Attorneys, 5th edition, p. 104. As to warrants of attorney to confess or suffer judgment, see 1 and 2 Vict. c. 110, § 9.

(g) *Cornie v. Grigor*, and *Orr v. Meikle and Smith*, *supra*. See also *Robertson v. Robertson*, 2 July 1831, 9 S. 865; *Gordon v. Hill*, 28 Nov. 1839, 2 D. 150; and *Jaffray v. Simpson*, 1 July 1835, 13 S. 1122. The compromise of an action may be proved by writings which are neither holograph nor tested, taken in combination with parole evidence; *Love v. Marshall*, 12 June 1872, 10 Macph. 795; and an agreement by a person to compromise an action to which he is not a party may also be proved *prout de jure*; *Thomson v. Fraser*, 30 Oct. 1868, 7 Macph. 39.

7. It may be here observed that a curator *ad litem*, appointed to minors pursuing an action, has been held to have no power to enter into a transaction to discharge the action on payment of a certain sum. *(h)* The powers of judicial factors, &c., in regard to compromises, are not very well defined. In one case, a petition by a judicial factor for authority to compromise an action was refused as unnecessary, the transaction being clearly for the benefit of the estate; *(i)* in two cases the application was granted; *(k)* while in one instance the Court refused to authorise a curator *bonis* to compromise a law-suit relating to heritage. *(l)*

Powers of judicial factors to compromise.

8. A law agent has no implied authority to sist a mandatory for a client who has gone abroad *pendente lite*. *(m)*

Sisting a mandatory.

9. It has been held in England that a solicitor has no implied authority to pledge his client's credit to his counsel by an express promise to pay his fees, so as to enable the counsel to sue his client for them, which he cannot do without a promise of payment. *(n)*

Pledging client's credit for advocates' fees.

10. The agent employed by the pursuer of an action has an implied authority to receive payment or tender of the debt or sum sued for, and of the expenses of process. *(o)* But, apparently, a curator *ad litem* cannot grant a valid dis-

Power to receive payment of sum sued for, &c.

(h) Stephenson v. Lorimer, 16 Jan. 1844, 6 D. 377.

(i) Anderson, 7 March 1855, 17 D. 596, and 29 Jan. 1857, 19 D. 329.

(k) Dalmahey, 9 July 1836, 14 S. 1125; M'Dougall, 24 June 1853, 15 D. 766. See also Aikman, 17 July 1863, 1 Macph. 1140, where a *curator bonis* was authorised by the Court to pay the expenses incurred by a party who had unsuccessfully litigated against the curator's ward, in terms of an agreement previously entered into that the expenses of the litigation should in any case be paid out of the fund in dispute.

(l) M'Gregor, 10 March 1846, 18 Jur. 346.

(m) Gunn & Co. v. Couper, 22 Nov. 1871, 10 Macph. 116, overruling Elder v. Young, 27 June 1854, 16 D. 1003.

(n) Mostyn v. Mostyn, 21 March 1870, 5 Law Reports, Chancery Appeals, 457.

(o) Jameson v. Beatson, 5 March 1798, 4 Pat. App. 27; Chitty on Contracts, 9th edition, pp. 680 and 737; Yates v. Frecklington, 2 Douglas, 622; Crozier v. Pilling, 23 April 1825, 4 Barnewall & Creswell, 28; Wilnot v. Smith, 2 Dec. 1828, 3 Carrington & Payne, 453; Mason v. Whitehouse, 9 July 1838, 4 Bingham's New Cases, 692.

charge unless he has obtained special power from the Court on a formal application. (*p*)

Discretion-
ary power
in the re-
covery of a
debt.

11. It has been held, in a question between agent and client, that an agent employed to recover payment of a debt is entitled to use a sound discretion in the execution of diligence against the debtor and his estate; (*q*) and the same would probably be held in a question between the debtor and the creditor, or between the debtor and the agent. (*r*) But an agent who has been employed merely to conduct judicial proceedings ought not to use diligence on the decree, unless he has been specially authorised to do so. (*s*)

Discretion-
ary power
in executing
diligence.

12. The question whether an agent employed to execute diligence has any implied discretionary power in the matter, was raised in the recent case of *Cameron v. Mortimer*, the circumstances of which were as follows:—A creditor having employed a solicitor in Forres to raise and enforce diligence on a bill granted by a debtor, also residing there, the solicitor employed another solicitor in Elgin, where the sheriff-court is situated, to take the necessary steps to obtain a warrant of imprisonment, and to transmit it to Forres. The Elgin solicitor accordingly proceeded to do so, but agreed with the debtor's agent to grant a few days' delay. The creditor, however, repudiated this arrangement, and proceeded to enforce the diligence by arresting the debtor. The debtor then raised an action of damages against the creditor, on the ground of wrongous apprehension after an agreement to give delay, and obtained a verdict. On a motion for a new trial, the Court held, by a majority of one, that the verdict was con-

(*p*) *Pratt v. Knox*, 28 June 1855, 17 D. 1006; *Stephenson v. Lorimer*, 16 Jan. 1844, 6 D. 377.

(*q*) *Macara v. Phillips*, 9 Dec. 1825, 4 S. 296 (N. E. 299).

(*r*) See *Cameron v. Mortimer*, *infra*; and *Anderson v. Watson* (13 Aug. 1827, 3 Carrington & Payne, 214), where an attorney, who had received merely general instructions as to the investment of a sum of money, having discovered that the security was bad, took legal proceedings against the borrower, and ultimately arrested him, without having been specially authorised so to do, and the Court held him not liable in damages to the borrower, in respect that he had acted in *bona fide*, and that his client did not repudiate his proceedings.

(*s*) See *Kyd v. Ferguson*, 11 March 1826, 4 S. 549 (N. E. 557).

trary to evidence, in respect that there was no evidence of express authority to grant delay, and that the Elgin solicitor, being an agent for a limited purpose, and not employed generally to recover a debt, had no implied authority to give delay. (t) At the second trial, the pursuer put in evidence an admission by the defender of the pursuer's statement on record that the Elgin solicitor had "acted as agent of the defender in raising and enforcing the diligence." The presiding judge having directed the jury that they were the sole judges upon the evidence as to whether the Elgin solicitor had express authority, but that in law he had no implied authority to delay diligence in the circumstances stated by the pursuer on record, the pursuer's counsel excepted to the latter part of this direction, and asked the judge to direct that the question, whether the Elgin solicitor had implied authority to grant the delay, was one on the evidence for the jury, and the judge having declined to give this direction, the pursuer's counsel again excepted. The jury having returned a verdict for the defender, the case came again before the Court on a bill of exceptions. But the Court unanimously disallowed both the exceptions stated. (u)

13. An agent employed to raise and enforce diligence has no implied power, on receiving payment from a cautioner or a party with a right of relief, to bind his client to assign the diligence. (x)

Power to assign diligence.

14. When proof is limited to the writ of a party, the writ

Writ of agent.

(t) *Cameron v. Mortimer*, 9 Feb. 1872, 10 Macph. 461.

(u) *Cameron v. Mortimer*, 18 June 1872, 10 Macph. 817. It has been recently held in England that an attorney employed to sue for a debt in a county court, has no implied authority, after he has obtained judgment for the debt, to enter into an agreement with the debtor not to enforce such judgment for a time (*Lovegrove v. White*, 26 May 1871, 40 Law Journal, Common Pleas, 253). An attorney employed to execute a *ca. sa.* (personal diligence) is not entitled to discharge a debtor who has been taken into custody, on any other arrangement than the full payment of the debt (*Connop v. Challis*, 10 June 1848, 17 Law Journal, Exchequer, 319. See also *Savary v. Chapman*, 5 May 1840, 11 Adolphus & Ellis, 829, and 15 and 16 Vict. c. 76, § 126). But an attorney has a discretionary power in executing a *fi. fa.* (diligence against goods and chattels); *Levi v. Abbott*, 22 Dec. 1849, 11 Law Journal, Exchequer, 62.

(x) *Cameron v. Robertson*, 2 Feb. 1830, 8 S. 430.

of his law agent or factor is not equivalent thereto, (y) unless the agent or factor is *praepositus*, i.e., placed by his client in his own position, or as his representative in the whole management of his affairs. (z)

Extrajudicial statements.

15. Extrajudicial statements made by a law agent as to matters of fact are not binding on his client without express proof of authority. (a) But correspondence between law agents may, of course, be admissible as evidence when it constitutes the *res gestae* of a transaction, e.g., to prove the fact that an offer has been made on one side or another, and the terms of such offer. (b)

Implied authority to receive payment of price, &c.

16. When a party executes and puts into his agent's hands a deed which contains a clause in the usual form acknowledging the receipt of a sum of money, such, for example, as the price of property sold, this implies authority to the agent to receive payment on delivery of the deed. (c) But the mere possession by an agent of a deposit-receipt in favour of a client, who has not indorsed it, does not authorise the agent to uplift the sum deposited. (d)

Authority of agents in questions with clients.

17. In a question between agent and client, the extent of the agent's authority depends upon the client's instructions, which may be proved *prout de jure*; (e) and a reasonable

(y) *Wallace v. M'Kessock*, 4 March 1829, 7 S. 542; *Mair & Sons v. Thom's Trs.*, 20 Feb. 1850, 12 D. 748; *Smith v. Smith*, 4 Dec. 1869, 8 Macph. 239.

(z) *Smith v. Falconer*, 17 Feb. 1831, 9 S. 474; *M'Gregor v. M'Gregor*, 27 June 1860, 22 D. 1264; *Dickson on Evidence*, §§ 1473 and 1591.

(a) *Dickson on Evidence*, § 1472; *Hogg v. Campbell*, 23 June 1865, 3 Macph. 1018; *Smith v. Smith*, 4 Dec. 1869, 8 Macph. 239; *Wagstaff v. Wilson*, 1832, 4 Barnewall & Adolphus, 3. See also *Pollok v. Morris*, 4 July 1845, 7 D. 973.

(b) *Smith v. Smith*, *supra*.

(c) *Clark v. Glen*, 14 June 1836, 14 S. 966; *Swan v. Baird*, 13 Dec. 1836, 15 S. 251. See also *Gordon v. Trotter*, 11 June 1833, 11 S. 696; and *Gillon v. Baillie*, 25 June 1835, 13 S. 977.

(d) *Forbes' Exrs. v. Western Bank*, 9 March 1854, 16 D. 807. See also *River Clyde Trs. v. Duncan*, 24 Jan. 1851, 13 D. 518; affirmed 17 March 1853, 15 D. (H.L.) 36. Parties making payment to a solicitor, without ascertaining whether he is authorised to receive the money, must bear the loss in the event of the solicitor misappropriating it; *Withington v. Tate*, 1 Feb. 1869, 4 Law Reports, Chancery Appeals, 288.

(e) *Corbet v. Douglas & Jarvie*, 5 March 1808, Hume, 346; *Boswell v.*

latitude will generally be given in construing the terms of a mandate. *(g)* Thus, when a party empowers a law agent to recover a debt, the agent is entitled to take all proper legal steps for that purpose, at his discretion, including the employment of a sub-agent, the raising of an action, and the execution of diligence. *(h)* The transmission of a current bill is a warrant to do diligence on it when it becomes due, *(i)* but not to raise an ordinary action thereafter for the expenses of the diligence. *(k)* A mandate to act for a party in a multiplepinding, and "generally in relation to a succession" in which he was interested, was held sufficient warrant to defend an action of declarator subsequently raised; *(l)* and authority to an agent to carry on "all proceedings which he may deem requisite," was held to entitle him not only to raise an action, but also to use inhibition and arrestment on the dependence. *(m)* Similarly, when a party abroad authorised his factor and commissioner to take the necessary steps for serving him heir to an ancestor, and to institute all actions necessary to make his right effectual, this was held to be a sufficient mandate to raise an action of reduction of a service obtained by another party. *(n)* But a mandate to carry on proceedings in an inferior court does not warrant

Selkirk, 9 March 1811, Hume, 350; *Highgate v. Boyle*, 18 Nov. 1819, Hume, 356; *Dickson on Evidence*, § 567.

(g) See *Burnett v. Clark*, 10 Dec. 1771, M. 8491; *Stewart v. Kidd*, 21 Feb. 1852, 14 D. 527; *Smith v. Harris*, 3 March 1854, 16 D. 727; and *Barclay v. Glendronach Distillery Co.*, 21 Oct. 1868, 7 Macph. 9. As to mandates to vote in sequestrations, see 19 and 20 Vict. c. 79, §§ 4 and 63; *Morison v. Balfour*, 16 Feb. 1849, 11 D. 653; and *Ewing v. Watson*, 11 Jan. 1860, 22 D. 354.

(h) *Macara v. Phillips*, 9 Dec. 1825, 4 S. 296 (N. E. 299); *Sanderson v. Campbell*, 17 May 1833, 11 S. 623. See also *Gordon*, 2 Nov. 1750, and *Drummond*, 8 Jan. 1751, Elch. (Factor) Nos. 9 and 10, where factors authorised to sue for debts were held entitled to enter claims therefor on forfeited estates.

(i) *Murray v. Durne*, 6 Dec. 1797, Hume, 323; *M'Donald v. Kelly*, 5 July 1821, 1 S. 105 (N. E. 102).

(k) *Menzies v. Caldwell*, 21 June 1834, 12 S. 772.

(l) *Macbrair v. Small*, 22 Nov. 1870, 8 Scot. Law Rep. 141.

(m) *E. of Caithness v. Eaton*, 5 July 1836, 14 S. 1091.

(n) *Gifford v. Gifford*, 11 Feb. 1834, 12 S. 421.

an appeal to the Court of Session ;(*o*) and similarly, authority to conduct a litigation in the Court of Session does not cover an appeal to the House of Lords.(*p*) In one case a joint obligation to defray the expense of carrying on certain actions for mutual behoof was held to be limited to the expenses of the actions while conducted by the agent specially appointed in the agreement, and not to extend to those incurred after his renunciation and the appointment of another agent.(*q*) Of course, proceedings in excess of the authority originally conferred may be subsequently adopted or homologated.(*r*)

Discretion-
ary power
in conduct-
ing litigation.

18. As long as a law agent does not deviate from the positive instructions of his client,(*s*) he is entitled to exercise his own discretion in the general conduct of judicial proceedings, without the necessity of communicating with his client at every stage ;(*t*) and only fraud, or gross negligence or want of skill, will render him liable in damages for the loss of an action.(*u*) But he is not entitled to abandon an action without previously communicating with his client ;(*x*) and he requires express authority to enter into a judicial reference,(*y*) or to take any other extraordinary step, such as granting a release to a witness ;(*z*) and although, as already stated, it has never been positively decided that a compro-

(*o*) *Murdoch v. Hunter*, 15 Feb. 1815, 18 F.C. 216; *M'Queen & M'Intosh v. Colvin*, 4 July 1826, 4 S. 786 (N. E. 793); *Bonny v. Gillies*, 13 Nov. 1829, 8 S. 13; *Ewing v. Watson*, 11 Jan. 1860, 22 D. 354; *Stephen v. Skinner*, 17 Dec. 1863, 2 Macph. 287.

(*p*) *Robertson v. Foulds*, 9 Feb. 1860, 22 D. 714.

(*q*) *Taylor v. Wight*, 14 June 1827, 5 S. 797 (N. E. 737).

(*r*) *Robertson v. Foulds*, *supra*; *Macqueen & Mackintosh v. Colvin*, 19 March 1827, 4 Mur. 192; 2 Kent's Com. 615; *Pothier, Contrat de Mandat*, § 99.

(*s*) *Forbes & Co. v. Campbell*, 17 July 1845, 7 D. 1068; *Fray v. Voules*, 3 May 1859, 1 Ellis and Ellis, 839.

(*t*) *Urquhart v. Grigor*, 12 June 1857, 19 D. 853.

(*u*) See Chapter on Professional Liability.

(*x*) *Urquhart v. Grigor*, *supra*. See also *Cormie v. Grigor*, 23 May 1862, 24 D. 985, and 30 Jan. 1863, 1 Macph. 357; and *Orr v. Meikle & Smith*, 6 July 1867, 39 Jur. 557.

(*y*) *Livingston v. Johnston*, 23 Feb. 1830, 8 S. 594.

(*z*) *Dickson v. Taylor*, 1 Nov. 1816, 1 Mur. 143.

mise is necessarily *ultra vires* of an agent in a question between the parties to an action, yet such an important proceeding ought never to be taken without special authority, for although binding on a client it may be a good ground for an action of damages at his instance against his agent. (a)

19. As law agents are frequently employed as factors and commissioners in the management of their clients' affairs, it may not be out of place to point out what powers are implied in a general factory, and what powers require to be specially conferred. Powers of factors.

A general factory or mandate, *i.e.* empowering the factor to manage the constituent's business or affairs as he shall think proper and expedient, (b) is held to confer only powers of general management and ordinary administration. (c) It is even doubted by Professor Montgomerie Bell whether such a factory would authorise a factor to uplift rents and interests except in a case of emergency. (d) General factory.

20. In order to bind his constituent a factor requires to be specially authorised to do any of the following acts:— Powers that require to be specially conferred on factors.

To sell or alienate heritable estate, (e) or even moveable "of more than ordinary value;" (g) to gift away any sort of property, or to discharge an obligation gratuitously; (h) to postpone a constituent's claims or security; (i) to compromise; (k) to refer to arbitration; (l) to purchase or feu land; (m)

(a) *Ante*, p. 97, *et seq.*

(b) *Juridical Styles*, 4th ed., vol. ii. p. 41.

(c) *Ersk.* iii. 3. 39; *Stair* i. 12. 15; *Menzies's Lectures on Conveyancing*, 3d ed. p. 472.

(d) *Bell's Lectures on Conveyancing*, p. 420.

(e) *Stair*, i. 12. 15; *Ersk.* iii. 3. 39.

(g) *Ersk.*, *supra*.

(h) *Stair and Ersk.*, *supra*; *Purves v. Smith*, 13 June 1628, M. 4049; *Drummond v. Ross*, 25 Nov. 1824, 3 S. 315 (N. E. 223).

(i) *Bridges v. Wilson's Trs.*, 22 Nov. 1831, 10 S. 43.

(k) *Anderson's Crs. v. Handyside*, 16 Dec. 1737, Elch. (Factor) 3; *Hollinworth v. Dunbar*, 21 Jan. 1813, 17 F.C., 107.

(l) *Stair and Ersk.*, *supra*; *Bell on Arbitration*, p. 115; *Livingston v. Johnston*, 23 Feb. 1830, 8 S. 594.

(m) *Stuart v. Dixon*, 17 July 1857, 19 D. 1071.

to procure a constituent entered heir to an ancestor;(*n*) to enter vassals;(*o*) to grant leases;(*p*) to remove tenants;(*q*) to borrow money;(*r*) to exercise the right of patronage;(*s*) to appoint sub-factors;(*t*) to sue and defend.(*u*)

Power to
sist a man-
datory.

21. Whether a factor can, without special authority, sist a mandatory for his constituent seems rather doubtful. In one case a commission granted by a person before leaving this country, conferring the usual powers to sue and defend, was held to entitle the commissioner to sist himself, but not another person, as mandatory for his constituent.(*x*) But in

(*n*) Stair and Ersk., *supra*; Pothier, *Traité du Contrat de Mandat*, § 162. By the Titles to Land Consolidation Act (31 and 32 Vict. c. 101, § 29), every petition for service is required to be subscribed by the petitioner or by a mandatory specially authorised for the purpose. In the case of *Molle v. Riddell* (13 Dec. 1811, 16 F.C. 429, affirmed 19 June 1816, 6 Pat. App. 168), a factor, acting under the authority of a general commission, having received a letter from his constituent desiring to be served heir to an estate, "if not already set about," was held entitled to expedite a service; and although such a mandate might not now be sufficient under the Titles to Land Consolidation Act, an informal authority of this kind would still justify a factor in taking up a lucrative succession by writ of *clare constat*, or in any other way than by service; Bell's Lectures, p. 421.

(*o*) Bell's Lectures, p. 421.

(*p*) Bell's Lectures, *supra*.

(*q*) *York Building Co. v. Carnegie*, 14 Nov. 1764, M. 4054. See also 16 and 17 Vict. c. 80, § 30.

(*r*) *Thomson v. Fullarton*, 22 Dec. 1842, 5 D. 379. In the peculiar circumstances of this case, a power to sell certain shares was held to imply a power to borrow on the security of them, as the power of sale would otherwise have been inoperative.

(*s*) *Tait v. Keith*, 22 Jan. 1778, M. 9938, affirmed 30 March 1778, 2 Pat. App. 447.

(*t*) Bell's Lectures, p. 421; Menzies's Lectures, p. 474; Story on Agency, § 13. There are, however, cases in which power to delegate may be implied, "as where it is indispensable by the laws in order to accomplish the end, or it is the ordinary custom of trade, or it is understood by the parties to be the mode in which the particular business would or might be done." Story on Agency, §§ 14 and 201; 2 Kent's Com. 633.

(*u*) *Whyte v. Maxwell*, 1 June 1850, 12 D. 955; *Smith v. Harris*, 3 March 1854, 16 D. 727. A factor with power to draw the rents of land or houses would probably be held entitled to take the necessary legal steps to recover them; Bell's Lectures on Conveyancing, p. 422.

(*x*) *Dempster v. Potts*, 18 Feb. 1836, 14 S. 521.

a recent case it was held by the Lord Ordinary (Ormidale), in whose judgment the parties acquiesced, that an Englishman holding a power of attorney from a person abroad was entitled to appoint a mandatory in Scotland.(y) A law agent, however, has no implied authority to sist a mandatory for an absent client.(z)

22. Power to a factor to alter the nature of his constituent's succession is not readily inferred. Thus, where the factor of a heritable creditor who was authorised to obtain him infert on a heritable bond, and "to act and do all other things relative to the premises," agreed, along with the other creditors of the debtor, to sell the lands and divide the price, and the constituent died abroad after the sale, but before payment of the price, the Court held that the factor had not sufficient authority to change the nature of the debt from heritable to moveable.(a)

Altering
constituent's
succession.

23. A factor with full power to sue all necessary actions for the recovery of a debt, and to discharge the same, may raise an action in his own name, as the acting factor of his constituent, without making him a party to the process.(b)

Factor suing
in his own
name.

24. "Where in general mandates some things are specially expressed, the generality is not extended to cases of greater importance than those which are expressed,"(c) nor, in ordinary circumstances, to any cases of a different kind from those which are expressed.(d) In all cases, however, a reasonable latitude must be allowed in construing the terms of a factory. Thus, a power to sell will generally, though not necessarily, imply a power to receive the price;(e)

Construing
the terms
of a factory.

(y) *Knight v. Freeto*, 5 Dec. 1863, 2 Macph. 386. See also *Story on Agency*, § 14.

(z) *Gunn & Co. v. Couper*, 22 Nov. 1871, 10 Macph. 116.

(a) *Brown v. Brown*, 26 Jan. 1779, M. 5593. As a heritable security is now moveable *quoad* the succession of the creditor, unless executors are excluded (31 and 32 Vict. c. 101, § 117), a question of this kind is less likely to arise now than formerly.

(b) *Whyte v. Maxwell*, 1 June 1850, 12 D. 955. See also *Stewart v. Kidd*, 21 Feb. 1852, 14 D. 527.

(c) *Stair*, i. 12. 15.

(d) *Ersk.* iii. 3. 39.

(e) *Thomas v. Walker's Trs.*, 4 Dec. 1832, 11 S. 162.

and although a power to sell does not usually comprehend a power to borrow, yet when a factor was authorised to sell certain railway shares, and to do all acts and deeds needful and requisite with regard to them, he was held entitled to borrow money on them, and assign them in security, in order to save them from forfeiture by paying off arrears of calls.(e) Similarly, a factor who has power to grant a lease is presumed to have power to modify its provisions;(g) and a factor empowered to sue for debts was held entitled to enter a claim for a debt on a forfeited estate.(h)

Power must be exercised in the manner prescribed.

25. When a factory specifies a particular mode in which an act is to be done, the factor cannot validly exercise his power in any other way. Thus, where a power of attorney was granted by certain substitute heirs of entail who resided abroad, authorising their attorney to signify their consent to a private bill before the committees of the House of Lords and the House of Commons, but the power of attorney did not reach this country until after the bill had passed into an Act, containing a clause that none of its provisions should take effect till the heirs "to this Act" should be declared before the Court of Session; it was held that the power of attorney having limited the consent to be given to one form only, the consent could not be given in a different form.(i)

Factor not entitled to use his authority against his constituent.

26. A factor is not entitled to make use of his authority to the effect of making his constituent a party to proceedings in which their interests are opposed.(k)

Homologation of proceedings in excess of factor's authority.

27. A constituent who recognises acts done by his factor, beyond the powers which he has conferred upon him, will be bound by subsequent acts of the same kind.(l)

(e) *Thomson v. Fullarton*, 22 Dec. 1842, 5 D. 379.

(g) *Grant v. Sinclair*, 23 March 1861, 23 D. 796.

(h) *Gordon*, 2 Nov. 1750, Elch. (Factor) 9; *Drummond*, 8 Jan. 1751, Elch. (Factor) 10.

(i) *Sir W. M. Napier*, 4 March 1837, 15 S. 745. See also *Thomson v. Fullarton*, 22 Dec. 1842, 5 D. 379.

(k) *Anderson v. Shand*, 8 June 1833, 11 S. 688.

(l) *Thomas v. Walker's Trs.*, 4 July 1829, 7 S. 828.

CHAPTER VIII.

DISSOLUTION OF THE RELATION OF AGENT AND CLIENT.

1. The relation of agent and client may be dissolved in any of the ways by which the authority of ordinary agents and factors may be determined, that is to say:—

Different
ways in
which
agency may
terminate.

1st, By the revocation of the client, or the resignation of the agent.

2d, By the death, insanity, or bankruptcy of either client or agent.

3d, By the performance of the business for which the agent has been employed, whereby he becomes *functus officio*, or by the lapse of a specified time during which he has been authorised to act. (a)

As, however, the occurrence of these events does not always operate as a complete revocation of an agent's authority, they require a more detailed consideration.

2. The authority conferred on an agent or factor is, in general, revocable at the will of the client or constituent. (b) Even when a factory has been granted for life, it may be revoked for just causes, such as the factor's unfitness for his

Revocation.

(a) Pothier, *Traité du Contrat de Mandat*, § 100 *et seq.*, and § 139 *et seq.*; Story on Agency, chapter xviii.; Chitty on Contracts, 9th edition, p. 193; 1 Bell's Com. 488; Pulling's Law of Attorneys, 5th ed., p. 106; 2 Kent's Com. 643.

(b) Balfour's Practicks, p. 301; Story on Agency, § 463 *et seq.*; Bell's Lectures on Conveyancing, p. 423; Menzies's Lectures, p. 474; Bell's Prin., § 228; *Regiam Majestatem*, iii. 16; *Freeman v. Fairlie*, 20 Nov. 1838, 8 Law Journal, Chancery, 44.

duties.(c) But where a father had nominated tutors for his eldest son, and had at the same time appointed a factor to manage the estate during the son's pupillarity, the tutors were held not entitled to recall the factor unless the factor were guilty of malversation.(d) Authority conferred on an agent may be recalled, not only by an express revocation, but by implication, as where the same powers are conferred on a different person.(e) But it has been held that a mandate to grant a lease was not impliedly revoked by a factor to raise money on the estate either by lease, assignation, or conveyance.(g) In all cases in which third parties have been led to rely on an agent's credit or authority, the revocation must be duly notified to them in order to release the client or principal from liability for his agent's subsequent transactions.(h) Of course, a party who exercises his right of revocation is bound to indemnify his agent for his trouble and expense,(i) and to relieve him of all obligations properly undertaken in the course of his employment.(k)

Resignation.

3. An agent or factor is generally entitled to resign, on giving reasonable notice of his intention so to do.(l) But an agent who, without communicating with his client, abandons an action which he has been employed to conduct, subjects himself to an action of damages,(m) and even one who

(c) *Heddrington v. Book & Dod*, 14 July 1724, M. 4047. As to cases in which the principal has expressly agreed that the authority conferred shall be irrevocable, and the agent has an interest in its execution, see *Story on Agency*, § 476.

(d) *Walkinshaw v. Gray*, 9 Dec. 1743, M. 4049.

(e) *Story on Agency*, § 474.

(g) *Patten v. Carruthers*, 24 March 1770, 2 Pat. App. 238.

(h) *Bell's Prin.* § 228; *Chitty on Contracts*, 9th edition, p. 194; *Story on Agency*, § 470.

(i) *Walker v. Somerville*, 13 Dec. 1837, 16 S. 217. See also *Forbes v. Ross and Paterson*, 26 Nov. 1675, 1 Br. Sup. 745.

(k) *Story on Agency*, § 466; *Chitty on Contracts*, 9th edition, p. 194; *Ersk.* iii. 3. 40.

(l) *Story on Agency*, § 478; *Bell's Lectures on Conveyancing*, p. 424; *Ersk.* iii. 3. 40.

(m) *Urquhart v. Grigor*, 12 June 1857, 19 D. 853. See also *Henderson v. Gilfillan*, 24 May 1833, 11 S. 653.

has ceased to act as agent is liable for loss arising from his not answering letters relating to the affairs of a former client.(n) When an agent retires from the conduct of litigation the Court will not order intimation thereof to be made to the opposite party.(o) But where an agent has intimated his withdrawal, or has died, it is proper for the Court, before pronouncing judgment by default, to order intimation to be given to the client of the motion for judgment by default.(p) It has never been decided in Scotland whether a law agent is entitled to abandon without reasonable cause the prosecution or defence of an action which he has undertaken to conduct: but an opinion has been expressed that he is not,(q) and this is in accordance with English law.(r)

(n) *Short v. Lascelles*, 16 May 1828, 6 S. 810.

(o) *Scott v. Christie*, 16 Dec. 1856, 19 D. 178.

(p) *Ritchie v. Aitchison*, 21 Jan. 1848, 10 D. 454. As to the proceedings required in English Courts on the withdrawal of an attorney, see *Lush's Practice*, 3d ed., p. 253, and *Pulling's Law of Attorneys*, 5th ed., p. 110.

(q) *Per* Lord President Hope in *Johnstone v. Scott*, 4 Jan. 1829, 7 S. 234.

(r) "It was formerly considered that an attorney who had once undertaken the prosecution or defence of a suit for his client, was bound to continue his services until it was concluded, although the client omitted to furnish the necessary funds. (1 Sid. 31; *Mordecai v. Solomon*, Say. 173, Tidd, 9th edit. 86.) But it is now settled that an attorney is not required to proceed to the end of a suit, in order to be entitled to his costs; but that he may, upon reasonable cause and reasonable notice, abandon the conduct thereof, and recover his costs for the period during which he has been employed. (*Harris v. Osbourn*, 2 C. and M. 629; *Whitehead v. Lord*, 7 Exch. 691; *Nicholls v. Wilson*, 11 M. and W. 106; *Vansandau v. Brown*, 9 Bing. 402. What is not reasonable notice of abandonment; *Hoby v. Buitt*, 3 B. and Ad. 350.) Thus, if the client denies his liability to pay the costs already incurred in the suit, the attorney may at once refuse to proceed further therewith, and bring an action for his costs. (*Hawkes v. Cottrell*, 3 H. and N. 243.) So where, in an action in an attorney's bill for business done in Chancery, it appeared that the plaintiff had given notice that he would not go on with the suit without being supplied with money, and had actually given up the papers on the master making a report: it was held that the attorney might recover for the work done up to that time, although the suit was not finally determined. (*Rouson v. Erle*, M. and M. 538.) So it is held that an attorney is not bound to proceed with a cause, unless the client, on reason-

Death.

4. In the case of an ordinary mandate or factory, the authority of the agent or factor ceases at the death of the client or constituent: *mortuo mandante, cessat mandatum*.(s) And where the appointment has been made by a body of trustees, tutors, or others, if their power ceases by the death of any one of their number, the appointment will also fall at the death of any one of them.(t) But an agent or factor is entitled to act until he receive authentic intelligence of the death of his employer;(u) and exceptional cases may occur in which, notwithstanding his constituent's death, a factor may carry out directions previously given to him.(x) A procuratory *in rem suam* does not fall by the death of the granter.(y)

Insanity of client.

5. It is not quite clear whether the supervening insanity of a client necessarily operates a recal of an agent's appointment.(z) Third parties who have dealt with the agent in

able notice, make advances to pay costs out of pocket. (*Wadsworth v. Marshall*, 2 C. and J. 665.) And it has been held that if an attorney had reasonable ground for commencing an action, and it appears that he desisted only because he afterwards found that the cause could not be sustained, he will be entitled to recover for his work and labour. (*Per Tindal, C. J., Lawrence v. Potts*, 6 C. and P. 428.)—Chitty on Contracts, 9th edition, p. 529. See also Pulling's Law of Attorneys, 5th edition, p. 326; Story on Agency, § 479; and Pothier, *Contrat de Mandat*, § 142.

(s) *Duffus v. Forrester*, 2 Feb. 1628, M. 3166; *Drummond v. Sinclair*, 17 Dec. 1714, M. 4046; *Balfour's Practicks*, p. 301; Pothier, *Contrat de Mandat*, § 139; Story on Agency, § 488; Bell's Prin. § 228; Ersk. iii. 3. 40; 1 Bell's Com. 488; *Malins v. Greenaway*, 24 Nov. 1847, 10 Beavan, 564.

(t) *Stewart v. Baikie*, 29 Feb. 1832, 10 S. 392, reversed 7 April 1834, 7 W. and S. 211.

(u) *Campbell v. Anderson*, 7 Dec. 1826, 5 S. 86 (N. E. 80), affirmed 1 May 1829, 3 W. and S. 384; Ersk. iii. 3. 41; Just Inst. iii. 26. 9. See, however, *Kennedy v. Kennedy*, 15 Nov. 1843, 6 D. 40.

(x) *Straiton v. Straiton*, 7 Dec. 1692, 4 Br. Sup. 16. Story on Agency, § 496.

(y) *Shaw v. Dunipace*, 30 June 1629, M. 3166; Story on Agency, § 489. Procuratories of resignation and precepts of sasine are expressly declared by the statute 1693, c. 35, not to fall on the death of either granter or grantee. Precepts of *clare constat*, which were excepted from this provision, now remain in force, notwithstanding the death of the granter; 31 and 32 Vict. c. 101, § 103.

(z) *Morrison v. E. of Sutherland*, 21 June 1749, M. 4595, reversed 13 Feb. 1750, 1 Pat. App. 456; *Allan*, 10 Feb. 1854, 16 D. 534; *Walcott*, 11

bona fide, and in ignorance of the client's incapacity, are entitled to be protected;(a) but as soon as an agent becomes aware of a client's insanity he ought not to continue to act for him in judicial proceedings without obtaining fresh authority from his legal guardians.(b) In a recent case, where the pursuer had become insane during the dependence of a reclaiming note, his counsel informed the Court of the circumstance, and the Court continued the cause to enable the nearest relatives of the pursuer to consider whether they would apply for the appointment of a *curator bonis*; and on their failing to take any steps in the matter, a curator *ad litem* was appointed on the motion of the defender.(c) In somewhat special circumstances, it was held that the currency of an agent's account was not interrupted by his client's having a fit of insanity of a few weeks' duration.(d)

6. The bankruptcy of a client or constituent operates as a revocation of his agent's authority in regard to all rights of which he is divested by the bankruptcy.(e) The bankruptcy of the agent generally operates also as a revocation of his authority.(g)

7. When authority is conferred for a definite period, it terminates with the lapse of that period. Thus a factory to endure while a party is absent from this country naturally falls on his return.(h) A factory granted indefinitely by a minor with consent of his curators, does not fall on his attaining majority, but continues until it be *de facto* recalled.(i)

Feb. 1826, 3 Bingham, 423; Pothier, Contrat de Mandat, § 139; Story on Agency, § 481; 2 Kent's Com. 645; Bell's Prin. § 228.

(a) 1 Bell's Com. 489; Pollock v. Paterson, 10 Dec. 1811, 16 F.C. 369 and 727; Ivory's Ersk. vol. i. note 244.

(b) Reid v. Duff, 19 Jan. 1839, 1 D. 400; McCall v. Sharp, 31 Jan. 1862, 24 D. 393. Pothier, Contrat de Mandat, § 139.

(c) Mitchell v. Whitelock, 10 Dec. 1864, 3 Macph. 229.

(d) Wink v. Mortimer, 8 March 1849, 11 D. 995.

(e) Story on Agency, § 482; 1 Bell's Com. 488; Bell's Lectures, p. 424.

(g) Story on Agency, § 486.

(h) Haggart v. Miller, 29 May 1838, 16 S. 1058.

(i) Nasmyth v. Nasmyth, 12 Nov. 1624, M. 4046.

8. There are no Scotch cases in regard to the dissolution of the relation of agent and client by the performance of the work for which the agent has been employed. It has, however, been held in England that the authority of an attorney employed to conduct litigation comes to an end when final judgment has been obtained, *(k)* but that it may be renewed by any acts showing the client's intention that his attorney shall continue to act for him. *(l)*

(k) *Macheath v. Ellis*, 1 May 1828, 4 Bingham, 578. See also Oughton's *Ordo Judiciorum*, vol. i. tit. 51.

(l) *Butler v. Knight*, 22 Jan. 1867, 2 Law Reports, Exchequer, 109.

CHAPTER IX.

REMUNERATION OF LAW AGENTS.

1. When a law agent is professionally employed, he does not require to stipulate that he is to be paid for his services, the mere fact of his employment being sufficient to infer an undertaking on the part of his client to allow him remuneration at the ordinary rate.^(a) It is only, however, in matters properly falling within the scope of a law agent's business that such an undertaking can be reasonably regarded as implied. It has accordingly been held that an agent accepting the office of a member of a committee of a joint-stock company is bound, in the absence of any stipulation to the contrary, to discharge gratuitously all the ordinary duties of a member.^(b) The presumption in favour of remuneration may, of course, be rebutted by circumstances; as, for example, where a law agent is precluded from making professional charges on account of his holding a fiduciary character,^(c) or where he has agreed to give his services gratuitously, or to charge only his outlays.^(d) But so strong is the legal presumption, that such an agreement will not be inferred from a promise by an agent to defend any summons

Implied
right of
law agents
to remunera-
tion.

(a) *Cullen v. Baillie*, 19 June 1855, 2 Macq. 80; *Goodsir v. Carruthers*, 19 June 1858, 20 D. 1141; *Bell v. Ogilvie*, 18 Dec. 1863, 2 Macph. 336; *Winton v. Airth*, 17 July 1868, 40 Jur. 622.

(b) *Duncan v. Union Canal Co.*, 8 Feb. 1831, 9 S. 398.

(c) On account of its importance this disability is fully considered in a separate chapter.

(d) *Swanson v. Robertson*, 14 June 1833, 11 S. 718; *Thwaites v. Mackerson*, 10 July 1828, 3 Carrington and Payne, 331; *In re Philp*, 10 Feb. 1860, 2 Giffard, 35.

that may be brought' against a party;(e) and even litigants on the poor's roll are not absolutely exempt from liability for their agents' accounts.(f)

Agent conducting his own cause.

2. A duly qualified law agent who has conducted a cause of his own, and been found entitled to expenses, is allowed to make professional charges for his trouble.(g) In a recent case an award of expenses in favour of a writer to the signet, pursuing an action against a client, was held to embrace (1) a remuneration, but not on the scale of professional charges, for time for searching for documents of which he was custodian, with a view to his examination as a haver; (2) the expense of making copies and inventories of documents, &c.; and (3) the expense of going to London and acting as his own agent there at the examination of the defender as a witness (the nature of the case being such as to necessitate professional attendance at the examination); but he was held not entitled to the expense of a London agent who also attended on his behalf, nor the charges and expenses incurred by going twice to London to attend the defender's examination as a haver, but only to the charges which would have been incurred for securing the attendance of counsel and a London solicitor.(h) In another case, a country agent was not allowed remuneration for loss of time as a professional man in coming to Edinburgh to depone as a party

(e) *Young v. M'Gill*, 28 May 1823, 2 S. 346 (N. E. 303).

(f) It is expressly provided by A. S. 10 July 1839, § 135, that in the Sheriff-Court "the pauper shall not be liable in payment of any of the dues of the Court, or fees to the procurator, or to the officer, except actual outlay, unless expenses shall be awarded and recovered in the process." In the Court of Session, on the other hand, it would appear that a poor's agent is entitled to operate payment of his account out of any fund which may come to belong to a client on the poor's roll, although he will not be permitted to use personal diligence; *Taylor v. Barr*, 11 March 1841, 3 D. 892, and 16 F. 936; *Gordon v. Davidson*, 13 June 1865, 3 Macph. 938.

(g) *Cuthbertson v. Elliot*, 14 Jan. 1860, 22 D. 389. The English rule on the subject is the same as ours; *Lush's Practice*, 3d ed. p. 896; *Pulling's Law of Attorneys*, 5th ed. p. 267; *Archbold's Chitty's Practice*, 12th ed., vol. i. p. 48. The French authorities to the same effect will be found elaborately discussed in *Gugy v. Brown*, 15 Dec. 1866, 1 Law Reports, Privy Council Appeals, 411.

(h) *Cuthbertson v. Elliot*, 14 Jan. 1860, 22 D. 389.

on a reference to oath.(i) A professional man who is examined as a haver by his opponent is not entitled *pendente processu* to claim remuneration for time and trouble;(k) but he may be allowed reimbursement of actual outlay.(l)

If an agent who conducts his own cause is uncertificated, he can recover no more than his actual outlays.(m)

3. It is stated by Mr Menzies and Mr A. M. Bell, in their Lectures on Conveyancing, that the office of factor is presumed to be gratuitous when there is no mention of remuneration in the factory.(n) Their only authority, however, for this statement is a case which was decided in 1736;(o) while other decisions, most of which are more recent, seem to show that it is always a question of circumstances whether, in the absence of an express stipulation, a factor who is not a law agent is entitled to remuneration for his services.(p) In any case, as professional men are not generally presumed to act gratuitously, the applicability of such decisions to law agents at the present day seems more than doubtful. It has, moreover, been recently held that the office of factor for a trust is in its nature remunerative.(q) Power to appoint sub-

Implied
right of
factors to
remunera-
tion.

(i) *Thorburn's Trs. v. Short*, 22 May 1838, 16 S. 1016.

(k) *M'Gill v. Ferrier*, 2 Dec. 1836, 15 S. 178.

(l) *Burden v. Leitch*, 11 July 1840, 2 D. 1380.

(m) *Stewart v. A. B.*, 16 May 1827, 5 S. 658 (N. E. 614); *M'Gowan v. Baillie*, 6 March 1828, 6 S. 696; *Ireland v. Wilson*, 25 June 1851, 13 D. 1226.

(n) Menzies, 3d edition, p. 475; Bell, p. 425.

(o) *Lady Orbiston v. Hamilton*, 17 Feb. 1736, M. 4063.

(p) *Duchess of Buccleuch v. Nairne*, 1 July 1712, M. 4051 and 4061; *Graham v. Freer*, 14 Jan. 1824, 2 S. 606 (N. E. 518); *Brown's Trs. v. Brown*, 3 March 1830, 4 W. & S. 28; *Sanderson v. Donaldson*, 23 Nov. 1830, 9 S. 74; *Roberts v. Court*, 24 Jan. 1833, 11 S. 314, affirmed 25 July 1838, 3 S. & M'L. 317.

(q) *Goodair v. Carruthers*, 19 June 1858, 20 D. 1141. In this case trustees, who were empowered by the trust-deed to appoint agents and factors either of their own number or other fit persons, nothing being said as to remuneration, employed a legal firm of which one of the trustees was a partner; and the Court held that, the offices of agent and factor being in their nature remunerative, the authority to appoint a trustee to hold them implied authority to allow him remuneration, and that the firm was therefore entitled to charge the trust-estate with commission and law expenses.

factors includes a power to allow them a reasonable salary.(*r*) But even when a factor is entitled under his factory to a salary, he may show by his actings that he passes from his right, for example, by rendering accounts for many years without making any charge for his trouble;(s) and he may be similarly barred from claiming remuneration for extra services not covered by the salary allowed him.(*t*)

Implied
right of
election
agents to
remunera-
tion.

4. There is an old case in which an English attorney, who had acted as an election agent, was held not entitled to a recompense without a previous bargain.(*u*) But the decision cannot be regarded as authoritative at the present day, especially as it seems contrary to the law of England.(*x*)

Repayment
of disburse-
ments.

5. Although clients are bound, if required by their agents, to supply funds for necessary disbursements,(*y*) it is the general practice of law agents to advance such sums as are needed for incidental outlay, such as fees to counsel, dues of court, and stamp-duties.(*z*) Agents are, of course, entitled

(*r*) *D. of Roxburgh v. Swinton*, 2 March 1824, 2 Sh. Ap. 18; *Graham v. Freer*, 14 Jan. 1824, 2 S. 606 (N. E. 518).

(*s*) *Boyes v. Waring*, 6 March 1822, 1 Sh. Ap. 121; *Graham v. Freer*, 14 Jan. 1824, 2 S. 606 (N. E. 518); *Sanderson v. Donaldson*, 23 Nov. 1830, 9 S. 74. See also *Phoenix Assurance Co. v. Young*, 5 June 1834, 12 S. 680.

(*t*) *Rose v. E. of Fife*, 25 April 1806, 5 Pat. App. 115.

(*u*) *Bulman v. E. of Galloway*, 16 Jan. 1766, M. 13,435.

(*x*) *Hingston v. Kelly*, 22 June 1849, 18 Law Journal, Exchequer, 360. In this case, the plaintiff having without any express agreement given his services as an election agent, and voted for the defendant at the election, which a paid agent was not entitled to do, the Court held that the true question for the jury was whether, taking all the evidence together, the plaintiff had made out that he was to be paid for his services; Parke, B., observing "the plaintiff being a professional man and performing professional services, was *prima facie* entitled to remuneration. His voting, indeed, was an act which amounted to a statement by himself that he was not to be paid. Still, if the case had rested there, the jury, notwithstanding the voting, might have believed that the contract was that the plaintiff was to be paid."

(*y*) *Per* Lord Justice-Clerk Inglis, in *Bell v. Ogilvie*, 18 Dec. 1863, 2 Macph. 336.

(*z*) The same practice now prevails in England, although it seems to have been formerly considered illegal for an attorney to lay out his own money for the maintenance of his clients' suits.—*Pulling's Law of Attorneys*, 5th ed., p. 323.

to be reimbursed all such advances, as well as all other proper outlays made by them in the course of their employment on account of or for the benefit of their clients.(a) They are also entitled to be relieved of all expenses incurred in carrying on or defending actions in their own name for the benefit and at the express or implied request of their clients.(b)

6. As a general rule, an agent is not entitled to recover from a client disbursements which are either unreasonable or manifestly unnecessary, unless they have been expressly authorised by the client himself.(c) Moreover, an agent may forfeit all claim to reimbursement, as well as to remuneration, if through his negligence or mismanagement his proceedings have proved useless or prejudicial to his employer.(d) And a practitioner who is not duly qualified by admission and taking out an annual certificate is incapable of suing for disbursements made by him in proceedings which he is not entitled to conduct.(e)

What disbursements cannot be recovered.

7. The amount of remuneration implied in the employment of law agents is regulated by a fixed tariff. Charges for conducting judicial proceedings are regulated by the table of fees of the court in which the proceedings have taken place.(g) In regard to conveyancing and general

Tables of fees.

(a) *Carrick v. Manford*, 26 Jan. 1854, 16 D. 410; *Sinclair v. Bryson*, 16 June 1825, 4 S. 97 (N. E. 99); *Stuart v. Stevenson*, 13 Feb. 1828, 6 S. 591; *M'Ra v. Pedie*, 3 Dec. 1835, 14 S. 100; *Dingwall's Tr. v. Earl of Kintore*, 1 Feb. 1862, 24 D. 427; *Story on Agency*, § 335; *Pothier, Traité du Contrat de Mandat*, § 133. See also *Wood v. Northern Reversion Co.*, 20 Dec. 1848, 10 D. 941.

(b) *Alison v. Smart*, 26 Feb. 1840, 15 F. 703, and 2 D. 676; *Carrick v. Manford*, 26 Jan. 1854, 16 D. 410; *Story on Agency*, § 335.

(c) *Story on Agency*, § 336; *Neilson v. Livingstone*, 20 Jan. 1859, 21 D. 282. See also *In re Bevan*, 8 Feb. 1846, 20 Beavan 146, in which a solicitor who took a journey to Paris merely to obtain the execution of a deed was allowed only the expense which would have been incurred by sending it to an agent on the spot, although on a previous occasion the client had expressly authorised a similar journey.

(d) See sections 20-23 of this chapter; and *Lewis v. Samuel*, 17 April 1846, 8 Adolphus and Ellis, Queen's Bench, 685.

(e) See Chapters II. and III.

(g) *Sinclair v. Bryson*, 16 June 1825, 4 S. 97 (N. E. 99). See the Appendix to this treatise, and Chapter XII., on Taxation.

business, certain tables of fees have been adopted by the various legal bodies.(h) That of the Society of Writers to the Signet is in use throughout the whole country, with the exception of what may be termed the Glasgow and Paisley district, in which a slightly different scale of charges is adopted.(i) As, however, the monopoly of law agents extends only to court practice, no society has power to make bye-laws regarding the amount of fees to be charged for conveyancing, &c., which shall be binding on its members; and where any dispute arises the Court may determine the *quantum meruit*, irrespective of any table of fees.(k) Very few questions of this kind have been raised. It may, however, be mentioned that the Court have decided that an agent who has prepared a writ of confirmation is entitled to charge the vassal an *ad valorem* fee;(l) and that a legatee is not bound to grant a formal discharge for a specific legacy, and pay an *ad valorem* fee to the agent preparing it; but it has been observed that the case of a residuary legatee is different, because trustees or executors are entitled to be exonerated on paying over the residue to the party entitled to it.(m) Where several parcels of land are sold or feued to the same party, they ought generally to be included in one deed; and the extra expense caused by separate conveyances will not be allowed, unless they have been specially desired or are obviously expedient.(n) When an *ad valorem* fee is charged on a transaction, it covers all relative matters, such as the examination of a progress of titles, the drafting of the deed, the correspondence and meetings in regard to it, and the responsibility for the sufficiency of the title to an estate.(o)

When commission is allowed on cash transactions.

8. A law agent is not entitled to any commission on sums received by him on behalf of his clients in transactions

(h) Appendix to this treatise.

(i) Neilson v. Livingstone, 20 Jan. 1859, 21 D. 282; Galloway v. Ranken, 11 June 1864, 2 Macph. 1199.

(k) Galloway v. Ranken, *supra* (i).

(l) Galloway v. Ranken, *supra* (i).

(m) Fleming v. Brown, 6 Feb. 1861, 23 D. 443.

(n) Neilson v. Livingstone, 20 Jan. 1859, 21 D. 282.

(o) Journal of Jurisprudence, xiv. 29; Hope v. Hope, 12 Feb. 1856, 18 D. 585.

for which he charges *ad valorem* fees.(o) In all other cases, the right to a commission and the amount thereof seem to depend upon circumstances. In one case an agent was held not entitled to charge a commission of 2½ per cent. on sums passing through his hands, amounting to £6646, of which £5000 had been delivered to him merely in order to be handed over to a party who had agreed to borrow it; but the auditor having reported that £42 was a sufficient recompense, that sum was allowed to the agent for his trouble.(p) Even when an agent is not legally entitled to charge a commission, a client may be barred by acquiescence from objecting *ex post facto*;(q) and conversely, an agent who regularly renders his accounts without making any charge for commission will be held to have waived or abandoned his right to do so.(r)

9. Where a factor is entitled to a reasonable gratification for his trouble, but the parties are not agreed as to the amount, the Court will fix it according to the circumstances of the case, 2½ per cent. being regarded as a moderate commission,(s) while 5 per cent. seems to be the maximum in ordinary circumstances.(t)

10. The law of Scotland regards with great suspicion and jealousy any deviation from the fixed tariff according to which law agents are entitled to be remunerated.(u) The rule of law on this subject is founded, not only on the danger

Amount of commission allowed.

Agreements between agent and client as to remuneration.

(o) *Renny v. Bruce*, 26 Jan. 1837, 15 S. 418; *Hope v. Hope*, 12 Feb. 1856, 18 D. 585; *Neilson v. Livingstone*, 20 Jan. 1859, 21 D. 282.

(p) *Dunlop's Trs. v. Lang*, 18 Jan. 1825, 3 S. 442 (N. E. 309).

(q) *Ommaney v. Smith*, 3 March 1854, 16 D. 721.

(r) *Tod's Trs v. Melville*, 5 Feb. 1836, 14 S. 432. See also *Boyes v. Waring*, 6 Mar. 1822, 1 S. App. 121; *Graham v. Freer*, 14 Jan. 1824, 2 S. 606 (N. E. 508); *Sanderson v. Donaldson*, 23 Nov. 1830, 9 S. 74; *Phoenix Assurance Co. v. Young*, 5 June 1834, 12 S. 680.

(s) *Campbell v. Rose*, 6 Dec. 1752, M. 516, and 5 Br. Sup. 802; *Brown's Trs. v. Brown*, 3 March 1830, 4 W. & S. 28.

(t) *D. of Queensberry v. M'Murdo*, 14 May 1804, 4 Pat. App. 565.

(u) The law of England on this subject has been completely altered by a recent statute (33 and 34 Vict. c. 28), which allows attorneys and solicitors to enter into agreements with their clients as to the amount and mode of their remuneration. Improper agreements may, however, be set aside.

of agents taking advantage of their clients, but also on the principle that the stirring up of doubtful law-suits is not to be encouraged.(x)

Remuneration beyond the ordinary rate.

11. There is only one case in which an agreement to allow a law agent remuneration beyond the ordinary rate was brought under the notice of the Court. In that case an English solicitor had agreed to bear the whole expense of prosecuting a claim to an estate in Scotland, on condition that he was to receive, if successful, a large sum in addition to his expenses. The action having failed, the solicitor claimed payment of his business account, on the ground that the agreement was unlawful. The Court expressed some doubt as to the illegality of the agreement, as the solicitor had not advised the litigation, or acted as agent in the proceedings; but they held that, whether the agreement was lawful or not, the solicitor was barred from pleading its illegality, and claiming remuneration on a footing inconsistent with it.(y) There is thus no positive authority in regard to the legality of such agreements; but, on the analogy of the Common Law of England on the subject,(z) it is thought that a law agent could not enforce an agreement under which he was to receive more than the usual professional remuneration.(a)

Agreement to charge only outlays unless expenses are recovered from opposite party.

12. It sometimes happens that an agent undertakes to conduct a cause on the understanding that he is to be paid only his actual outlays unless he succeeds in recovering his professional charges from the opposite party; and this is a very common arrangement when the client is himself a professional man.(b) When an agreement of this kind was first

(x) *Per* Lord Moncreiff, in *Bolden v. Foggo*, 27 Feb. 1850, 12 D. 798.

(y) *Bolden v. Foggo*, 27 Feb. 1850, 12 D. 798.

(z) *Philby v. Hazle*, 13 June 1860, 8 Scott, Common Bench, N. S., 647; *In re Newman*, 8 March 1861, 30 Beavan, 196; *Scarsh v. Rutland*, 26 May 1866, 1 Law Reports, Common Pleas, 642.

(a) This view is confirmed by the legal principle that a client is entitled to insist on his agent's accounts being taxed, by the prohibition of *pacta de quota litis*, and by the disfavour shown to gifts made by clients to their agents.

(b) *Henderson v. Gilfillan*, 24 May 1833, 11 S. 653; *Bayne v. Steele's Reps.*, 16 Nov. 1836, 15 S. 22.

brought under the notice of the Court, doubts were expressed as to its validity.(c) Lord Balgray observed that he could show no countenance to an agreement to carry on a suit at a cheaper rate than was sanctioned by the forms and practice of the Court, as such proceedings had a tendency to promote rash litigation, and was highly unbecoming on the part of any professional man. Lord Gillies, however, while disapproving of such agreements in ordinary circumstances, said, "It may happen that a case occurs when, from motives of charity or generous delicacy, an agent may offer his services to a man whose rank in life is incompatible with an application for the benefit of the poor's roll, while his misfortunes may have disabled him from seeking redress in this Court without some friendly assistance. An agent who offers to act for such a party, and stipulates that in the event of failure he will ask no remuneration beyond his actual outlay, does not derogate from what is becoming in professional men of the highest respectability in this Court." In the next case on the subject, a law agent who had committed a blunder in conducting a criminal prosecution, thereby occasioning considerable expense to his client, agreed to conduct a new prosecution, and to charge only outlay unless he succeeded in obtaining a verdict of guilty. The second prosecution failed; but the agent nevertheless claimed his full expenses. The Lord Ordinary, however, assailed the client from this claim, holding the agreement to have been becoming and proper in the circumstances; and this judgment was affirmed by the Court.(d) Several other cases show that agreements of this kind may (subject to certain restrictions mentioned in a previous chapter (e) in regard to the mode of proof) be competently founded on as a defence to an action by a law agent for payment of his professional charges.(g)

(c) *Clyne v. Swanson*, 26 Jan. 1830, 8. S. 391. It is observed by Lord Bankton that it is not honourable for an advocate to enter into an agreement of this kind; iv. 3, 22.

(d) *Swanson v. Robertson*, 14 June 1833, 11 S. 718.

(e) See Chapter VI. sect. 12, p. 90.

(g) *Bayne v. Steele's Reps.*, 16 Nov. 1836, 15 S. 22; *Bolden v. Foggo*, 27 Feb. 1850, 12 D. 798; *Taylor v. Forbes*, 13 Jan. 1853, 24 D. 19; *Knox v. M'Caul*, 8 Nov. 1861, 24 D. 16; *Bell v. Ogilvie*, 18 Dec. 1863,

In one case in which an Edinburgh agent had undertaken the conduct of a private cause of a country agent, on the footing that he was to charge for outlay only, and to take his chance of recovering his professional charges from the opposite party, it was assumed by the Court that the country agent might nevertheless render himself liable for the full amount of the Edinburgh agent's account by improperly abandoning the action, and thereby defeating the latter's chance of recovering his expenses from the opposite party.^(h)

Pleading
illegality of
agreement.

13. It does not seem to be a necessary inference from these cases that an agreement to carry on litigation at a cheaper rate than that which is sanctioned by the practice of the Court, is in all respects lawful and binding on the parties. The only general principle warranted

2 Macph. 336. By the common law of England, an attorney or solicitor may agree to perform work *gratis* (*Ashford v. Price*, 4 Jan. 1823, 3 Starkie, 185); or to charge only costs out of pocket (*Thwaites v. Mackerson*, 10 July 1828, 3 Carrington & Payne, 341; *In re Philp*, 10 Feb. 1860, 2 Giffard, 35); or to conduct business for a client on agency terms (*Foley v. Smith*, 21 July 1851, 20 Law Journal, Chancery, 621); and under the provisions of a recent statute, he may *inter alia* stipulate for remuneration at a lower rate than that at which he would otherwise be entitled to charge; 33 and 34 Vict. c. 28 § 4. But it appears to be still regarded as illegal for an attorney who is employed to conduct a lawsuit to stipulate for payment only in the event of success; 33 and 34 Vict. c. 28, § 13; Chitty on Contracts, 9th ed., 629: see, however, *In re Stretton*, 25 Nov. 1845, 14 Meeson & Welsby, 806; and Paterson's Compendium of English and Scotch Law, p. 163. And an attorney who undertakes to conduct a suit on such terms is not entitled upon failure of the suit to recover money paid out of pocket; *Turner v. Tennant*, 12 Feb. 1847, 10 English Jurist, Old Series, 429.

(h) *Henderson v. Gilfillan*, 24 May 1833, 11 S. 653. The country agent in this case had abandoned the action, except the conclusion for expenses, which was submitted to a referee; and the opposite party having died, no steps were taken in the submission. The Lord Ordinary assailed the country agent from the Edinburgh agent's claim for his professional charges, on the ground that he had acted *sine culpa* in regard to the pursuer's interest: and the Court adhered, with this variation (in consideration of the submission being still in force), that the absolvitor should only be *in hoc statu*. See also *In re Stretton*, 25 Nov. 1845, 14 Meeson & Welsby, 806.

by the decisions is—"that no party to an agreement shall be allowed to plead its illegality when he does so after acting on it, in order to obtain for himself a benefit which by the agreement he was not entitled to, and which he seeks to obtain contrary to the understanding on which he in point of fact acted by pleading its illegality."⁽ⁱ⁾ But it is quite common in ordinary practice for agents to act gratuitously, in the expectation of recovering their expenses from the opposite party; and this practice has been recognised by A.S. 19 Dec. 1835.^(j)

14. It is quite lawful for a trustee to stipulate that he shall not be personally liable, except to the extent of outlays, to a law agent employed by him in matters relating to the trust-estate; and an agreement to that effect may be proved *prout de jure*.^(k) Restriction of liability by trustee.

15. The Civil Law of Rome prohibited an advocate from entering into a *pactum de quota litis*, that is to say, any arrangement by which he was to receive, instead of the usual honorarium, a share of the property which was the subject of litigation.^(l) Lord Stair states that this prohibition has been adopted by our custom and extended to an agent or writer;^(m) and this doctrine is confirmed by several cases.⁽ⁿ⁾ Thus, where a writer had entered into a bargain with a client that he was to have one-third of whatever sum should be recovered, and two-thirds of the expenses, the contract was *Pactum de quota litis.*

(i) *Per* Lord Justice-Clerk Hope, in *Bolden v. Foggo*, 27 Feb. 1850, 12 D. 798; *Turner v. Tennant*, 12 Feb. 1847, 10 English Jurist, Old Series, 429. See also *Anderson v. Torrie*, 31 Jan. 1857, 19 D. 853, where an agent, who had guaranteed his client against the consequences of disregarding a poiding, pleaded, in defence to an action of damages at the client's instance, that the guarantee was illegal; but this objection was repelled. As to expenses, where an action for fulfillment of a mutual contract is successfully defended on the ground that the contract was illegal and void, see *Thomas v. Waddell*, 23 Feb. 1869, 7 Macph, 558.

(j) See Chapter XII., on Taxation.

(k) *Scotland v. Henry*, 19 July 1865, 3 Macph. 1125.

(l) D. ii., 14. 53; D. xlviii., 7. 1. 6; D. l., 13. 1. 12.

(m) *Stair*, i. 10. 8; *Bankton*, i. 11. 11, and iv. 3. 23.

(n) *Hume v. Nisbet*, 24 Feb. 1675, M. 9496; *Ruthven v. Weir*, 23 June 1680, M. 9499; *M'Kenzie v. Forbes*, 23 July 1774, 5 Br. Sup. 528; *Johnston v. Rome*, 1 Feb. 1831, 9 S. 364.

declared contrary to law and void, and the agent was suspended for between three and four months, the Court declaring that they proceeded to no higher punishment in respect that he acknowledged his fault and that he had erred through ignorance and not from any criminal design.(o) In a later case, a person who was not a practitioner in any court having entered into a similar agreement with a party for whom he acted as legal adviser, the Court set aside the agreement, under reservation of all claim in any competent form for payment of a suitable remuneration.(p) There was, however, a difference of opinion on the bench as to the applicability of the Roman doctrine in regard to a *pactum de quota litis*, Lord Justice-Clerk Boyle and Lord Cringletie being of opinion that it was part of our common law, and applicable to the circumstances of the case, while Lord Meadowbank thought that it had not been adopted by our law, and Lord Glenlee doubted whether the agreement was properly a *pactum de quota litis*. In this diversity of opinion, the only principle which the case can be regarded as establishing is that stated by Lord Glenlee, that "if one party having access as agent to all the circumstances of a case takes advantage of his superior knowledge and capacities, and thereby induces his client to make such a bargain, unless it be made to appear that the transaction was very reasonable indeed, it may be set aside." In any case, it does not amount to a *pactum de quota litis* for an agent to retain part of the subject of a law-suit in accordance with an arrangement to that effect entered into *after* the suit has been concluded.(q) It seems to have been somewhat strangely assumed in one case that an agent may lawfully bargain with a client to receive a *percentage* for commission and trouble on the amount of sums recovered by him;(r) and a spontaneous agreement by a pursuer to allow his agent, who

(o) *M'Kenzie v. Forbes*, *supra*.

(p) *Johnston v. Rome*, *supra*.

(q) *Hume v. Nisbet*, 24 Feb. 1675, M. 9496; Stair, i. 10. 8; Bankton, iv. 3. 23.

(r) *York Buildings Co. v. Taylor*, 8 June 1821, 1 S. 57 (N. E. 58); affirmed 4 June 1824, 2 S. App. 251.

had ceased to be a member of the College of Justice, a percentage on sums recovered, in addition to the amount of his account, was held not to warrant a complaint by the defender against the agent.(s) But in a much more recent case it appears to have been taken for granted by the Court that an agreement to allow an agent "a reasonable commission and allowance on the value of the property obtained," over and above professional charges, amounted to a *pactum de quota litis*, and was illegal.(t) The law on this subject is intimately connected with the prohibition contained in the old statute 1594, c. 220 (which will be found fully considered in a subsequent chapter), against the purchase of depending pleas.(u)

16. It may be here observed that there is nothing to prevent a *non-professional* person from bargaining that, in consideration of his advancing the money required to carry on a lawsuit, he shall receive a per-centage on the sum to be recovered.(v) The prohibitions of the law of England against maintenance and champerty are unknown in the law of Scotland.(x)

Maintenance
and cham-
perty.

(s) *Glasford v. Morrison*, 24 June 1823, 2 S. 417 (N. E. 372).

(t) *Farrell v. Arnott*, 14 July 1857, 29 Jur. 463, and 19 D. 1000. In this case interdict was sought against an arbiter on the ground that he was about to dispose *inter alia* of the claim of the agent under the agreement above stated, although it was a *pactum de quota litis*. The Court refused to interdict the arbiter, in respect that the question of the legality of the claims was before him, and that it was not to be presumed that he would decide contrary to law.

(u) See Chapter XVII. on Disabilities of Law Agents.

(v) *Rucker v. Fisher*, 9 Feb. 1826, 4 S. 438 (N. E. 443). If, however, such a person is the true *dominus litis*, he may be compelled to sist himself as a party to the action, and thus become liable in expenses to the opposite party.

(x) In England there are various penal statutes still in force applicable both to professional and non-professional men, prohibiting maintenance and champerty; 3 Edw. I. c. 25; 13 Edw. I. st. 1. c. 49; 32 Hen. VIII. c. 9. Maintenance is "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it;" while champerty is "a bargain with a plaintiff or defendant *campum partire*, to divide the land, or other matter sued for, between them, if they prevail at law; whereupon the champarter is to carry on the party's suit at his own expense;" 4 Blackstone, 134 and 135. See also 4 Kent's Com. 449; *Stanley v. Jones*, 31 Jan. 1831, 5 Moore & Payne, 193; and *Sprys v. Porter*, 25 Nov. 1856, 7 Ellis & Blackburn,

Duty of
agent to
render
accounts.

17. A law agent ought to keep regular and accurate books, and the accounts which he renders to his clients should be fair transcripts of the entries therein.^(y) He is

58; and, as to the Civil Law, C. ii. 14. But an assignment of a claim in security merely is not struck at; *Cockell v. Taylor*, 12 Jan. 1852, 15 Beavan, 103; *Anderson v. Radcliffe*, 11 June 1858, Ellis, Blackburn, & Ellis, 806; and generally, a transaction will not be regarded as amounting to maintenance or champerty unless it is contrary to sound policy and justice, or tends to promote unnecessary litigation; *Fischer v. Kamala Naicker*, 6 Feb. 1860, 8 Moore's Indian Appeals, 170. See also *Williams v. Protheroe*, 29 Jan. 1829, 5 Bingham, 309; and *Findon v. Parker*, 10 June 1843, 11 Meeson & Welsby, 675. Thus it has been held lawful for a solicitor to agree to conduct all the legal business of a client in consideration of a fixed annual salary, and to pay to the client any surplus that may arise of receipts over payments of costs; *Galloway v. Corporation of London*, 4 May 1867, 4 Law Reports, Equity, 90. The purchase, however, by an attorney of his client's interest, or any part thereof, in a suit which the attorney has been employed to conduct, is regarded as against public policy, and is consequently void, whether or not it strictly amounts to maintenance or champerty; *Hall v. Hallet*, 30 Oct. 1784, 1 Cox, 134; *In re Masters*, 1835, 4 Dowling, 18; *Reynell v. Sprye*, 15 March 1852, 1 De Gex Macnaughton & Gordon, 660; *Earle v. Hopwood*, 18 Jan. 1861, 30 Law Journal, Common Pleas, 217; *Simpson v. Lamb*, 1857, 7 Ellis & Blackburn, 84; *Hilton v. Woods*, 28 June 1867, 4 Law Reports, Equity, 432. By a recent statute it is made lawful for an attorney or solicitor to take security for future costs, and to stipulate for remuneration "either by a gross sum or by commission or per-centage, or by salary or otherwise, and either at the same, or at a greater or at a less rate, as or than the rate at which he would otherwise be entitled to be remunerated," subject, however, to certain equitable restrictions and safeguards, and providing that nothing in the Act contained "shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit or other contentious proceedings to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit, action, or proceeding;" 33 and 34 Vict. c. 28, §§ 4, 13, and 16.

^(y) *Stewart v. Scott*, 28 Feb. 1844, 6 D. 889. It has been held in England that where a solicitor acts as the general agent of a client, so as to be able at all times to receive the client's money without his knowledge, he will not be allowed to charge in respect of bills of costs for business done as a solicitor, if he neglects to keep regular accounts and to preserve vouchers against himself; *White v. Lady Lincoln*, 25 April 1803, 8 Vesey, 363. But the principle of this decision has not been extended to the case of a solicitor only receiving money for his client in respect of separate transactions,

bound to make out his accounts, at his own expense, whenever required by his employers;(z) and even when not specially requested to do so, he should generally render them annually,(a) as the effect of delay may be not only to preclude him from claiming interest,(b) but also to subject him in payment of at least his own expenses in an action of count and reckoning against him.(c)

18. As regards the form in which an account should be made out, there are no imperative regulations on the subject. In the ordinary case, the heading will merely bear the name of the party or parties intended to be charged, and specify the process or matter in which the work has been done. The account itself should contain all the information necessary to enable the client and the auditor to deal with it. The charges must be set forth in detail, and not lumped together. An account does not require to be subscribed, and there are no rules in regard to its delivery, or the period which should elapse before legal proceedings are taken for its recovery.(d)

Form of account.

19. A client may direct a payment to be appropriated in extinguishing any part of his obligations to his agent, and an agent who accepts such a payment must take it subject to that direction.(e) It would even appear that an agent who has received a sum of money for a specific pur-

Application of payments to account.

of which the client was aware at the time, and knew what was to be received; *In re Lee*, 12 Nov. 1868, 4 Law Reports, Chancery Appeals, 43.

(z) *Mackenzie v. M'Leod*, 16 Jan. 1839, 1 D. 360.

(a) *D. of Queensberry's Exrs. v. Tait*, 21 Dec. 1826, 5 S. 180 (N. E. 167).

(b) *Napier v. Balfour*, 2 June 1835, 13 S. 853; *Bremner v. Mabon*, 13 Dec. 1837, 16 S. 213. See also Chapter X. on Interest.

(c) *Macdonal v. Buchan*, 2 July 1817, 5 Dow, 127, 6 Pat. App. 330.

(d) In England no attorney or solicitor is entitled to sue for payment of costs until the expiration of one month after delivering to the party to be charged a bill duly subscribed, unless he can satisfy a judge of the superior courts that there is probable cause for believing that such party is about to quit England; 6 and 7 Vict. c. 73, § 37.

(e) *Mitchell v. Cullen*, 11 May 1852, 1 Macq. 190, and 1 Stuart, 718. When an agent becomes bankrupt after receiving from a client a sum of money for a specific purpose, the amount, if still distinguishable from the agent's own funds, will be taken out of his sequestration and repaid to the client; *Macadam v. Martin's Tr.* 5 Nov. 1872, 11 Macph. 33. See also *Brown v. Adams*, 16 July 1869, 8 Law Reports, Equity, 764; and *Peatfield v. Barlow*, 12 Mar. 1869, 8 Law Reports, Equity, 61.

pose is not entitled to retain any balance that may remain after that purpose is fulfilled, whatever claim he may have against his client. (g) When, however, a client makes an indefinite payment to account, it may, in the general case, (h) be applied at the option of the agent to any part of his account. (i) If there is no appropriation made by either agent or client, and there is an account current between them, indefinite payments are by law appropriated to the extinction of the items on the debit side, in the order of priority. (k)

Negligence or mismanagement of law agent a relevant defence.

20. It is a relevant defence to an action by a law agent for payment of his account that, owing to his negligence or mismanagement, the services for which he charges have proved useless or prejudicial to his client. (l) An allegation

(g) *Hendry v. Grant and Jameson*, 27 May 1868, 5 Scot. Law Rep. 544. See also *Campbell v. Little*, 13 Nov. 1823, 2 S. 484 (N. E. 429).

(h) As to the restrictions and qualifications attached to this privilege, see *Ersk. iii. 4. 2*; *Bell's Prin. § 563*; and *Forman v. Home*, 20 June 1844, 6 D. 1189.

(i) *Clyne v. Swanson*, 26 Jan. 1830, 8 S. 391; *Hotchkis and Meiklejohn v. Kirk*, 3 Feb. 1832, 10 S. 289; *Bremner v. Mabon*, 13 Dec. 1837, 16 S. 213; *Hamilton v. Ferrier*, 3 Dec. 1868, 6 Scot. Law Rep. 151.

(k) *Campbell v. Montgomerie*, 2 July 1839, 1 D. 1147; *Lang v. Brown*, 2 Dec. 1859, 22 D. 113. See also *Erskine's Prin. iii. 4. 1*, note (Guthrie's edition).

(l) *Short v. Lascelles*, 16 May 1828, 6 S. 810; *Ranken v. Drew*, 9 Feb. 1855, 17 D. 363; see also *Gunn v. Marquis of Breadalbane*, 17 Mar. 1849, 11 D. 1046, and cases *infra*. In the case of *Burness v. Morris*, 7 July 1849, 11 D. 1258, doubts were expressed by Lord President Boyle as to the competency of entertaining the objection in a summary application for taxation under A. S. 6 Feb. 1806. In the earlier English cases it was doubted whether an attorney's negligence or unskilfulness could constitute a defence to an action by him for his bill, or whether they merely formed a ground for a counter action against him; *Templer v. M'Lachlan*, 6 Feb. 1806, 2 Bosanquet & Puller's New Reports, 136; *Dix v. Ward*, 2 Dec. 1816, 1 Starkie, 409; *Passmore v. Birnie*, 1817, 2 Starkie, 59. But it is now settled that an attorney cannot recover either remuneration or disbursements for services which have proved wholly useless to the client owing solely to the attorney's negligence or want of skill; Chitty on Contracts, 9th edition, p. 522; Lush's Practice, 3d edition, p. 271; Pulling's Law of Attorneys, 5th ed., p. 327. "There are two cases in which a party is precluded from recovering for work and labour; one where work which is useful has been performed unskilfully; the other,

of this kind is sufficient to entitle a client to suspend a charge on a bill granted by him in payment of his agent's account,(*m*) or even to recover a payment actually made.(*n*) A town agent cannot, however, be deprived by the misconduct of his country agent of his right to payment of his own account;(o) and when an agent is employed in different matters under separate contracts of employment, an illiquid claim of damages arising out of his negligence in one piece of business cannot be set off against accounts for business done under other contracts of employment.(*p*)

21. Thus, an agent is not entitled to make any charge for framing a deed which is unnecessary,(*q*) or which proves altogether useless in consequence of a gross blunder,(*r*) for making up a title which turns out to be inept,(*s*) for raising

Illustrations.

where work, which is useless for the object in view, has been performed even skilfully."—*Per* Alderson, J., in *Hill v. Featherstonhaugh*, 25 May 1831, 7 Bingham, 569; See also *Montriou v. Jefferies*, 8 Dec. 1825, 2 Carrington & Payne, 113; *Allison v. Rayner*, 17 Nov. 1827, 7 Barnewall & Cresswell, 441; *Edwards v. Cooper*, 16 Feb. 1828, 3 Carrington & Payne, 277; *Lewis v. Samuel*, 17 April 1846, 2 Adolphus & Ellis, Queen's Bench, 685; *Long v. Orsi*, 10 June 1856, 26 Law Journal, Common Pleas, 127; *Coz v. Leech*, 14 Jan. 1857, 1 Scott, Common Bench, N. S., 617; *Dunn v. Hallen*, 1861, 2 Foster & Finlason, 642; *Fletcher v. Winter*, 1862, 3 Foster & Finlason, 138.

(*m*) *Haggart v. Cooper and Pearson*, 4 Dec. 1835, 11 F. 77; *Train v. Carlaw*, 20 Feb. 1846, 18 Jur. 258.

(*n*) *Grahame v. Alison*, 3 Dec. 1830, 9 S. 130, affirmed 19 July 1833, 6 W. & S. 518.

(o) *Train v. Carlaw*, *supra* (*m*); *Hamilton v. Thomson*, 21 Oct. 1868, 6 Scot. Law Rep. 14; *Macbrair v. Small*, 22 Nov. 1870, 8 Scot. Law Rep. 141.

(*p*) *Burt v. Bell*, 6 Nov. 1861, 24 D. 13. It has been held in England that where a solicitor has been retained for and has undertaken a particular business, his bill of costs for carrying that business through to its conclusion is only one bill, and that where the business in question is the prosecution of a suit, which he causes to be lost through his negligence he cannot recover any portion of his bill; *Stokes v. Trumper*, 24 July 1855, 2 Kay & Johnson, 232. See also *Bracey v. Carter*, 13 June 1840, 12 Adolphus & Ellis, 373.

(*q*) *Neilson v. Livingstone*, 20 Jan. 1859, 21 D. 282.

(*r*) *Haggart v. Cooper and Pearson*, 4 Dec. 1835, 11 F. 77.

(*s*) *Grahame v. Alison*, 3 Dec. 1830, 9 S. 130, affirmed 19 July 1833, 6 W. & S. 518; *Dixon v. Rutherford*, 11 Nov. 1863, 2 Macph. 61.

a superfluous action,(t) or for conducting proceedings which have proved ineffectual through his negligence,(u) or in which the expenses have chiefly arisen from his mismanagement.(x) When, however, judicial proceedings have been carried on with the assistance and under the advice of counsel, a client cannot free himself from liability for payment of his agent's account by the plea that his cause has been mismanaged.(y) In no case can a party plead the misconduct or irregularity of his own agent as a ground for exempting him from liability for expenses thereby occasioned to the opposite party;(z) though the Court may oblige an agent to pay personally expenses incurred through his negligence.(a)

Expense of
precaution-
ary proceed-
ings.

22. When, however, an agent, actuated solely by regard for the interest and greater security of his client, takes measures which are not actually required, he may be allowed his expenses. Thus, the agents of a lender on heritable security were held entitled to charge him with the expenses of obtaining a new infektment of the borrower after the completion of the investment, the borrower being in embarrassed circumstances, and there being a reasonable doubt as to the validity of his prior infektment.(b) Similarly, an agent was

(t) *Stewart v. M'Duff*, 21 May 1799, 4 Pat. App. 85. See also *Swanson v. Robertson*, 14 June 1833, 11 S. 718; and *Deuhurst v. Gardiner*, 24 March 1853, 2 Stuart, 336.

(u) *Short v. Lascelles*, 16 May 1828, 6 S. 810; *Train v. Carlaw*, 20 Feb. 1846, 18 Jur. 258; *Huntley v. Bulwer*, 18 Nov. 1839, 6 Bingham's New Cases, 111; *Bracey v. Carter*, 13 June 1840, 12 Adolphus & Ellis, 373; *Lewis v. Samuel*, 17 April 1846, 8 Adolphus & Ellis, Queen's Bench, 685; *Long v. Orsi*, 10 June 1856, 26 Law Journal, Common Pleas, 127; *Cox v. Leech*, 14 Jan. 1857, 1 Scott, Common Bench, N. S., 617; *Dunn v. Hallen*, 1861, 2 Foster & Finlason, 642; *Fletcher v. Winter*, 1862, 3 Foster & Finlason, 138.

(x) *Lockhart v. Wighton*, 3 Dec. 1830, 9 S. 134. It has been held in England that an attorney who does not communicate to his client an offer to compromise a cause, cannot charge his client with the costs thereafter incurred; *Sill v. Thomas*, 1839, 8 Carrington & Payne, 762.

(y) *Megget v. Thomson*, 2 Feb. 1827, 5 S. 275 (N. E. 256); *Landale v. Roughead*, 13 Jan. 1831, 9 S. 268; *Burness v. Morris*, 7 July 1849, 11 D. 1258.

(z) *Templeton v. Wotherspoon & Mack*, 21 May 1836, 14 S. 812.

(a) *Phillip v. Gordon*, 5 Dec. 1848, 11 D. 175.

(b) *Hope v. Hope*, 12 Feb. 1856, 18 D. 585.

allowed to charge a client with the expense of preparing a bill of advocacy which was never presented, the object having been to be able to present it at a moment's notice in the event of a charge being threatened.(c)

23. In order to preclude an agent from recovering payment of an account, it does not seem necessary to establish the same degree of negligence or unskilfulness as would be required in an action of damages against him. In an early case, however, in which a party objected to pay an account incurred in making up his title, on the ground that it had been made up erroneously, the defence seems to have been regarded as equivalent to a claim for reparation; and, the proper mode of making up the title being a question attended with difficulty, the defence was repelled.(d) But the case of *Graham v. Alison*,(e) the decision in which was affirmed by the House of Lords, seems to establish a distinction, in regard to the requisite degree of *culpa* on an agent's part, in the two cases of an action of damages against him and a claim for repetition of his business account. In that case it was held that an agent who had made up a title which was ultimately found to be inept was not liable in damages, in respect he had followed the usual course of practice, but that he was nevertheless bound to repay the amount of his account. In a later case Lord Mackenzie observed:—"This is not an action of damages indeed, but it is half way to one. It is for repetition of payment of an account, or what is equal to that, viz., refusal to pay a bill granted in payment of a taxed account. The case is not so strong as if it had been an action of damages, and there may be some difference of principle between it and such an action; but still the consideration I have mentioned is, I think, important. There must be serious blame on the agent's part established here; something, I should think, about half way between no blame and such extreme blame as would be the ground of an action of damages."(g) Effect seems to have been given to this view

Degree of negligence required to bar agent's right to remuneration.

(c) *Clyne v. Swanson*, 26 Jan. 1830, 8 S. 391.

(d) *M'Harg v. M'Lamerick*, 1770, M. 13,965.

(e) 3 Dec. 1830, 9 S. 130, affirmed 19 July 1833, 6 W. & S. 518.

(g) *Train v. Carlaw*, 20 Feb. 1846, 18 Jur. 258. Lord-President Boyle,

in a recent case, where an agent who had acted under the advice of counsel, and who therefore could not have been found liable in damages, was held not entitled to charge his client with the expenses of making up a title which had proved inept.(h)

Summary of
other rele-
vant de-
fences to
action for
payment of
agent's ac-
count.

24. Most of the various other relevant defences to an action by a law agent for payment of his account will be found fully considered in other chapters. A summary of them may, however, be here given:—

1. Denial of employment.(i)
2. That the defender, though the employer of the agent, is not the party legally liable in payment of his account.
3. That the agent was not duly qualified to conduct the business for which he charges, in respect either that he was not duly admitted,(l) or that he was not certificated during the period of his employment.(m)
4. That the agent was a trustee for the defender, or held an office of a fiduciary character, which disqualified him from making professional charges.(n)

however, appears to have thought that the same degree of blame must be established as would have rendered the agent liable in damages.

(h) *Dixon v. Rutherford*, 11 Nov. 1863, 2 Macph. 61. In England no distinction seems ever to have been drawn between the degree of negligence or want of skill requisite on the part of an attorney in order to found an action of damages against him, and that which is sufficient to justify a refusal to pay his bill. Apparently *crassa negligentia* is necessary in the latter as well as in the former case; and, moreover, it must be the sole cause of the business in question proving useless or ineffectual; *Dax v. Ward*, 2 Dec. 1816, 1 Starkie, 409; *Bulmer v. Gilman*, 30 April 1842, 4 Manning & Granger, 108; *Lewis v. Collard*, 25 Nov. 1853, 14 Scott, Common Bench, 208; *Stokes v. Trumper*, 24 July 1855, 2 Kay & Johnson, 232; *Chapman v. Van Toll*, 9 Nov. 1857, 27 Law Journal, Queen's Bench, 1; *Dunn v. Hallen*, 1861, 2 Foster & Finlason, 642.

(i) See Chapter VI. p. 86; *Clyne v. Thomson*, 16 Jan. 1823, 2 S. 121 (N. E. 112); *Macqueen and Mackintosh v. Colvin*, 19 March 1827, 4 Mur. 192; and *Ranken v. Drew*, 9 Feb. 1855, 17 D. 363.

(k) See Chapter XI. p. 144.

(l) See Chapter III. p. 61.

(m) See Chapter II. p. 54.

(n) See Chapter XIX.

5. That the agent agreed to act gratuitously, or to charge only in the event of success.(*o*)

6. Compensation.(*p*)

7. Prescription.(*q*)

8. That the agent has been guilty of gross or fraudulent overcharges.(*r*)

(*o*) See Chapter VI. p. 90, and sections 12-14 of this Chapter.

(*p*) *Gordon v. Innes*, 16 May 1826, 4 S. 577 (N. E. 585).

(*q*) See Chapter XVI.

(*r*) See Chapter XII.

CHAPTER X.

INTEREST.

General rule as to interest allowed on agents' accounts.

1. Law agents were formerly held not entitled to claim interest, even on outlays.(a) But it is now a settled rule that interest runs on disbursements and advances from their respective dates ;(b) and, in the general case, interest is also allowed on each separate business account from the date of a year after the last item.(c) There is, however, no inflexible rule, the question of interest being always one of circumstances.(d) An agent may forfeit all claim to interest on his professional charges by inexcusable delay in rendering his business accounts,(e) or by omitting to charge interest

(a) *Muirhead v. Town of Haddington*, 22 June 1750, M. 532 and 8487. By the common law of England interest is not due on bills of costs; *Moss v. Bainbriggs*, 13 June 1854, 18 Beavan, 478; *Lyddon v. Moss*, 29 April 1859, 4 De Gex & Jones, 104; but by a recent statutory provision it may be allowed on taxations in respect of disbursements and advances; 33 and 34 Vict. c. 28, § 17.

(b) *Young v. Baillie*, 3 March 1830, 8 S. 624; *Napier v. Balfour*, 2 June 1835, 13 S. 853; *Bremner v. Mabon*, 13 Dec. 1837, 16 S. 213; *Graham's Exrs. v. Fletcher's Exrs.*, 16 Dec. 1870, 9 Macph. 298; 1 Bell's Com. 648.

(c) *Henry v. Sutherland*, 13 Feb. 1801, 12 F.C. 495, and M. Appx. Annual Rent, No. 1; *Young v. Baillie*, 3 March 1830, 8 S. 624; *Walls*, 17 Feb. 1865, 3 Macph. 536. In the case of *M'Lelland v. Redfearn*, 6 Dec. 1844, 7 D. 179, interest at 4 per cent. was allowed *from the date of the last item* till citation, and thereafter at 5 per cent. till payment; but the question was not between agent and client, but between two clients, one of whom had erroneously paid the whole account and now claimed relief.

(d) *Bremner v. Mabon*, 13 Dec. 1837, 16 S. 213.

(e) *Napier v. Balfour*, 2 June 1835, 13 S. 853, where the account not

in the accounts which he renders, and of which he receives payment.(g)

2. When interest is allowed on an agent's account, it is generally at the rate of 5 per cent.(h) Not unfrequently, however, in practice the rule is adopted of stating interest at 5 per cent. on outlays, and 3 per cent. on professional charges; the interest on outlays being calculated from the respective dates when the same were paid; while that on the professional charges is reckoned only after giving a year's credit. In the ordinary case, compound interest will be refused(i) even on cash advances;(k) but this rule has been relaxed in exceptional circumstances, as, for example, where the advances have been such as are usually made by cashiers or bankers.(l)

Rate of
interest
allowed on
agents'
accounts.

having been rendered for twenty-six years, and being then proved to be due on a reference to the client's oath, interest was allowed on the items of actual outlay, but not on the professional charges. In the case of *Bremner v. Mabon*, 13 Dec. 1837, 16 S. 213, where there had been a delay of more than twenty years, a similar decision was given; but the agent was held entitled to impute a payment to account, in extinction exclusively of his professional charges, which did not bear interest.

(g) *Forman v. Home*, 20 June 1844, 6 D. 1189. The agent in this case had in 1830 rendered his business accounts for a number of years, with an entry blank as to interest, and adding after the amount of the balance (£300) "ex. int." (exclusive of interest). £100 was paid at the beginning of 1831, and £200 sometime thereafter. In 1836 he rendered new accounts, making a charge for interest on the old accounts; but the Court held that he was not entitled to do so.

(h) *Graham's Exrs. v. Fletcher's Exrs.*, 16 Dec. 1870, 9 Macph. 298; *Walls*, 17 Feb. 1865, 3 Macph. 536. See also *Smith v. Barlas*, 15 Jan. 1857, 19 D. 267, where it was held that, notwithstanding the abolition of the laws as to usury, "legal interest" still means 5 per cent.

(i) *Forman v. Home*, 20 June 1844, 6 D. 1189; *M'Lelland v. Redfearn*, 6 Dec. 1844, 7 D. 17.

(k) *Graham's Exrs. v. Fletcher's Exrs.*, 16 Dec. 1870, 9 Macph. 298.

(l) *Macdonald v. Macdonald*, 22 Feb. 1856, 18 D. 630. In this case an arrangement had been made in 1836 between a *curator bonis* and the agent for the ward's estate, by which the agent's accounts were paid without being taxed, he making a certain abatement on that footing. But in 1851 a party interested in the estate having insisted on taxation, it was held that the agent was entitled to remodel his accounts, to charge periodical interest on the accounts down to 1836, and interest upon the accumulated periodical interest from 1836 to 1851. In the case of the

Interest on
judicial ex-
penses not
generally
allowed
against
opposite
party.

3. When a party is found entitled to his expenses in judicial proceedings, neither he nor his agent-disburser is in ordinary circumstances allowed interest thereon, even to the extent of outlay, till the expenses have been constituted by decree, *(m)* from the date of which, however, interest runs, although the decree contains no decerniture for interest. *(n)* But it is quite competent to award interest on judicial expenses, or on disbursements forming part thereof; and this has been done in several cases where the circumstances were of an exceptional character. *(o)* In one case, in which the proceedings had lasted about ten years, during which the pursuer, who was ultimately found liable in expenses, had derived advantage of nearly £6000 from the interest of the fund in dispute, interest was allowed to run on the defender's account from the various dates at which he had made payments to his agent. *(p)* There is only one other reported case in which interest has been allowed on the total amount of an agent's account; and there the

Duke of Queensberry's Exrs. v. Tait, 21 Dec. 1826, 5 S. 180 (N. E. 167), which was an accounting between agent and client, the Court allowed the balances to be struck annually, the result of which was to allow compound interest to the client. In *Condie v. Macdonald*, 20 Nov. 1834, 13 S. 61, a *curator bonis* who was in advance for his ward was held entitled to impute the rents of the estate in extinction, first of the interest, and next of the principal of his advances, though it was objected that this was equivalent to allowing interest on interest. Again, in *Scott v. Handyside's Trs.*, 30 March 1868, 6 Macph. 753, which was an accounting for trust-funds for fourteen years following the truster's death, a factor had accumulated interest on his advances, with the principal, at the end of eleven years; and, in the circumstances of the case, the accumulation was sustained by the Court.

(m) 1 Bell's Com. 649; *Pearse v. Macdonell*, 2 March 1825, 3 S. 603 (N. E. 424); *Dykes v. Cullen*, 13 July 1852, 24 Jur. 616; and 1 Stuart, 1050; *Macpherson v. Tytler*, 1 June 1853, 15 D. 706; *Shepherd v. Hutton's Trs.*, 30 May 1855, 17 D. 783; *Caledonian & Dumbartonshire Railway Co. v. Lockhart*, 13 Jan. 1858, 20 D. 390.

(n) *Dalmahoy & Wood v. Magistrates of Brechin*, 5 Jan. 1859, 21 D. 210. See also *Dykes v. Cullen*, 13 July 1852, 24 Jur. 616; and *Whitehead & Morton v. Cullen*, 23 Nov. 1861, 24 D. 86.

(o) 1 Bell's Com. 649, and cases there referred to; and cases *infra*.

(p) *Groat v. Sinclair*, 15 May 1819, 19 F.C. 715.

account consisted chiefly of disbursements, the interest on which greatly exceeded the professional charges.(q) But there are several cases in which interest has been allowed on large outlays forming part of the expenses ultimately found due, and necessarily advanced a considerable time before the date of the decree,(r) such as a fee of five hundred guineas paid to an accountant,(s) and travelling and other expenses connected with proofs taken abroad, but not a printer's account.(t)

4. When the House of Lords order a respondent to repay expenses in which the appellant has been found liable in the Court of Session, and which have been paid, the respondent is not liable in interest thereon, where the judgment of the House of Lords is silent on that point.(u)

Interest not allowed on expenses repaid under order of House of Lords.

5. It is impossible to lay down any inflexible rules as to the rate of interest chargeable against law agents on money in their hands belonging to their clients; as each case must depend on its own circumstances. The following general principles seem, however, to be deducible from the reported cases.

Interest payable by law agents.

6. An agent or factor is liable only in bank interest on sums which have come into his hands in the course of litigation or ordinary business transactions, if he is neither under any obligation to invest them, nor required to pay them over immediately to his client.(x)

When only bank interest is payable by law agents.

When a party entitled to funds in an agent's possession causes delay in the payment thereof by raising questions as to the kind of discharge to be granted by him, the agent is liable only in bank interest, at least where he has consigned the amount in bank.(y)

(q) *E. of Fife v. Duff*, 3 March 1827, 5 S. 524 (N. E. 492).

(r) 1 Bell's Com. 649; *M'Dowall v. M'Dowall*, 8 Dec. 1821, 1 S. 200 (N. E. 188); affirmed 8 March 1825, 1 W. & S. 22.

(s) *Macpherson v. Tytler*, 1 June 1853, 15 D. 706.

(t) *Barclay v. Barclay*, 5 March 1860, 22 Jur. 354.

(u) *Ewart v. Latta*, 1 July 1865, reported under date 20 July 1865, 3 Macph. 1167; *Fleeming v. Howden*, 6th Nov. 1868, 7 Macph., 79.

(x) *M'Kenzie v. Campbell*, 19 Dec 1818, 19 F.C. 605.

(y) *Shirras v. Black*, 25 June 1824, 3 S. 183 (N. E. 123).

Agent not
entitled to
derive profit
from client's
funds.

7. But an agent who is entitled to retain funds belonging to a client (for example, in security of obligations undertaken by him on behalf of his client), is not allowed to derive any profit therefrom, but is bound to accumulate the interest annually with the principal sum, in other words, to pay compound interest.^(z) The same rule has even been followed in the case of an account current between agent and client, on the ground that an agent's accounts should be settled annually, on whatever side the balance may be.^(a)

Interest
when delay
in settle-
ment has
occurred
through
fault of both
agent and
client.

8. When delay in the adjustment and settlement of accounts has been occasioned partly by the fault of the agent, partly by that of the client, something between bank interest and full legal interest (i.e., 5 per cent.), will be allowed against the agent.^(b)

Interest on
trust funds
not invested.

9. In the case of *Fortune's Trs. v. Gibson-Craigs, Ward-law, & Dalziel*,^(c) factors and law agents for trustees, not having invested a sum of above £3000 of trust funds, but having, with the knowledge of the trustees, retained it in their own hands for some years, during which questions regarding the trust-estate were under discussion, the Court held that they were not bound to pay interest at a higher rate than 4 per cent., with which they had debited themselves. Lord Glenlee observed, that unless there was evidence of money having been tortuously and improperly kept in the hands of the factors, 4 per cent. was quite sufficient; and Lord Jeffrey stated that although 5 per cent. was allowed in the case of *Lady Montgomerie v. Wauchope*,^(d) which was decided in 1822, it was chiefly because that was then the ordinary and current interest which with common diligence might be obtained on perfect security.

10. Unless, however, those to whom a factor or agent is

(z) *D. of Queensberry's Exrs. v. Tait*, 23 May 1822, 1 S. 428 (N. E. 398), and 21 Dec. 1826, 5 S. 180 (N. E. 167). See also *Graham v. Freer*, 14 Jan 1824, 2 S. 606 (N. E. 518).

(a) *D. of Queensberry's Exrs. v. Tait*, *supra*. See also *Wellwood's Trs. v. Hill*, 17 Dec. 1856, 19 D. 187.

(b) *Roberts v. Court*, 5 June 1835, 13 S. 877, and 25 July 1838, 3 S. & M'L., 317.

(c) 16 Nov. 1839, 2 D. 59.

(d) 4 June 1822, 20 F.C. 620, and 1 S. 453 (N. E. 421).

primarily accountable approve of, or consent to, his retaining money which cannot be very speedily distributed, he will be chargeable with interest at 5 per cent. from the date when it ought reasonably to have been invested,(e) or else with compound interest at 4 per cent.(g)

11. Where an agent tortuously and improperly retains money which has come into his hands, there can be no doubt that he will be chargeable with at least full legal interest.(h) Happily, however, there are no Scotch decisions on the subject. It was recently held in an English case that when a solicitor is obliged to refund any gain which he has made at the expense of a client, he is liable in interest thereon at 5 per cent.(i)

Money im-
properly
retained in
agent's
hands.

12. A factor within the provisions of the Pupils Protection Act (viz., a factor *loco tutoris*, or *loco absentis*, or a *curator bonis*) is bound to lodge his ward's money in some one of the banks in Scotland established by Act of Parliament or Royal Charter, in a separate account or deposit in his own name as judicial factor; and the bank is bound, once at least in every year, to accumulate the interest with the principal sum. A factor keeping in his hands more than £50 belonging to the estate for more than ten days is chargeable with interest at 20 per cent. on the excess for such time as it is in his hands beyond the ten days; and unless the money has been kept from innocent causes, the factor has no claim for commission, and will be dismissed from his office.(k)

Factors
under Pupils
Protection
Act.

(e) *Brown's Trs. v. Brown*, 3 Mar. 1830, 4 W. & S. 28; *Fortune's Trs. v. Gibson-Craigs, &c.*, 16 Nov. 1839, 2 D. 59. See also *Robarts v. Court*, 24 Jan. 1833, 11 S. 314, and 25 July 1838, 3 S. & M'L. 317.

(g) *Wellwood's Trs. v. Hill*, 17 Dec. 1856, 19 D. 187. See also *Graham v. Freer*, 14 Jan. 1824, 2 S. 606 (N. E. 518); and *Lambe v. Ritchie*, 4 Dec. 1837, 16 S. 219.

(h) See opinion of Lord Glenlee in *Fortune's Trs. v. Gibson-Craigs, &c.*, 16 Nov. 1839, 2 D. 59; *Blair v. Muray*, 4 July 1843, 5 D. 1315; and *Buchanan v. Mackersey*, 13 Feb. 1847, 9 D. 700.

(i) *Tyrrell v. Bank of London*, 27 Feb. 1862, 31 Law Journal, Chancery, 369.

(k) 12 and 13 Vict. c. 51, §§ 5 and 37. See also Thoms on Judicial Factors, p. 192, and M'Laren on Wills and Succession, ii. 524.

CHAPTER XI.

PARTIES LIABLE IN PAYMENT OF LAW AGENTS' ACCOUNTS.

Employers
generally
liable.

1. In the ordinary case the parties liable in payment of a law agent's account are, of course, his employers. We have already seen what circumstances are sufficient to infer employment and thus to give rise to liability.(a)

Cases in
which em-
ployers are
not liable.

2. There are, however, some cases in which an employer is not liable in payment of his agent's account. Thus, a mandate may be conceived in such terms as to impose no liability on the granter;(b) or the whole conduct of parties may show that the agent has delegated the liability of his employer to some other person from whom alone he looks for payment, and in such circumstances he has no claim against his original employer.(c) It does not, however, amount to a delegation of liability for an agent to take a bill from a party against whom he knows that his employer has a claim of relief.(d) When an agent is entitled to payment of expenses from a third party, he may lose all claim therefor against his own client by failing to take the proper steps to recover them from the third party.(e)

(a) See Chapter VI. p. 86.

(b) *Wink v. Mortimer*, 8 March 1849, 11 D. 995. The mandate in this case was granted by the brother of a person who had become temporarily insane, and it authorised the agent to manage the affairs of the lunatic till the latter's restoration to health, the agent being taken bound to account for his intrusions to the lunatic or his legal heirs.

(c) *Hunter v. Falconer*, 13 Jan. 1835, 13 S. 252.

(d) *Aikman v. Fisher*, 21 Nov. 1835, 14 S. 56.

(e) *Wilson v. Reddie*, 5 March 1829, 7 S. 549. In this case the agent

3. In conveyancing and general business there are certain well-established professional rules, as to the proportion of the whole expenses of a transaction which must be borne by each of the contracting parties. For example, the expenses of a sale are divided equally between seller and purchaser; and the whole expense of a marriage contract is borne by the husband.^(g) But such rules merely regulate the liability of the parties *inter se*: each agent has a direct claim only against his own employer, whom he may sue for the amount of his charges, leaving the parties to operate their own relief.^(h) When, however, one of the contracting parties agrees to defray the whole expense of a transaction, he is directly liable in payment of the account of the other party's agent, and therefore cannot plead that the amount is compensated by counter-claims competent to him against the other party himself.⁽ⁱ⁾ And when a vassal is required to take out a charter, and sends his title-deeds to the agent of the superior, in order that one may be prepared, the employment is in practice held to be on behalf of the vassal, against

Professional rules in conveyancing, &c., as to division of expenses.

had delivered to a trustee on a bankrupt estate a discharge of an inhibition, without getting payment of expenses which had been incurred by him for his client, and which he was entitled to receive as preferable in virtue of the inhibition; and the Court, after receiving a report from the Deputy Keeper of the Signet as to the practice in such cases, held that the agent had acted on his own responsibility in handing the discharge to the trustee without obtaining payment of the expenses, and that therefore he had no claim against his client.

(g) See Appendix.

(h) There are no Scotch cases on the subject, but reference may be made to the following English decisions. Although a borrower must pay the whole expenses of a loan, the lender's attorney cannot sue him for his fees; *Rigley v. Daykin*, 25 Jan. 1828, 2 Younge & Jervis, 83. Nor can the attorney of a lessor sue the lessee (*Baker v. Meryweather*, 3 Nov. 1849, 2 Carrington & Kirwan, 737), unless the lessee has agreed to pay him; *Webb v. Rhodes*, 2 May 1837, 3 Bingham, New Cases, 732. Slight evidence of employment will be sufficient to render a lessee or mortgagor liable to the attorney who prepares the lease or mortgage; *Smith v. Clegg*, 1 May 1858, 27 Law Journal, Exchequer, 300. A lessor who has paid his own attorney for drawing the lease may sue the lessee for the amount; *Grissell v. Robinson*, 26 May 1836, 3 Bingham, New Cases, 10.

(i) *Pearson v. Bushby*, 10 March 1814, 17 F.C. 592. See also *Webb v. Rhodes*, *supra*.

whom the superior's agent has accordingly a direct claim for his professional fees.(k) An agent who prepares a deed, or into whose hands it comes in the course of his professional employment, is not bound to part with it to any one until his fees have been paid; and this lien generally operates against third parties as effectually as a direct right of action.(l)

Liability of
joint em-
ployers.

4. In the absence of any express stipulation, joint employers are liable conjunctly and severally for the whole amount of their agent's account.(m) But there is nothing to prevent them from limiting their liability to a definite amount or share.(n) Thus, an obligation granted by the creditors of the pursuer of an action to pay the expenses thereof, "each of us a proportion effeiring to our respective debts," has been held to import only a *pro rata* liability for the agent's account.(o) An agent who sues a client merely for his individual share of an account for joint proceedings, is not entitled to object to the auditor taxing off the other shares.(p)

Liability of
heritors to
common
agent in a
locality.

5. The general rule that joint employers are liable *singuli in solidum* seems to be subject to an exception in the case of a common agent in a locality, the heritors being apparently liable to him only in proportion to their several interests. When, however, an interim scheme has been

(k) *Stewart v. Cuninghame*, 11 Dec. 1841, 4 D. 249.

(l) See Chapter XV.; *Wight v. Kidd*, 27 Nov. 1828, 7 S. 70; and *Paul v. Meikle*, 11 Dec. 1868, 7 Macph. 235.

(m) *Walker v. Brown*, 23 Nov. 1803, 13 F.C. 271, and M. Appx. *Solidum*, No. 1; *Grant v. Wishart*, 17 Jan. 1845, 7 D. 274; *Webster v. M'Clelland*, 2 July 1852, 14 D. 932. See also *Taylor v. Wight*, 4 June 1827, 5 S. 797 (N. E. 737), where a joint obligation to be at the expense of carrying on various actions for mutual behoof was held to be limited to the expenses of the actions while conducted by the agent specially appointed in the agreement, and not to extend to those incurred after the renunciation of that agent and the appointment of another.

(n) *Grant v. Wilson*, 30 May 1804, Hume, 336; *Robinson v. Ross*, 5 July 1814, Hume, 352; *Watson and Stotts v. Earl of Selkirk*, 20 Feb. 1817, 19 F.C. 304.

(o) *Murdoch v. Hunter*, 15 Feb. 1815, 18 F.C. 216.

(p) *Macbrair v. Small*, 14 Jan. 1871, 8 Scot. Law Rep. 301. See also Chapter XII. on Taxation of Accounts.

approved by the Lord Ordinary, the common agent is thereupon entitled to decree against the heritors for the expenses previously incurred, in proportion to their liabilities as ascertained by the interim scheme, and is not bound to wait until the true liabilities shall be fixed in the final locality; and he must continue to be paid his expenses according to the interim scheme until it is altered.(q)

6. In some instances there may be such a joint connection between several parties that the employment of an agent by one is equivalent to employment by all. Thus, an agent employed by one of several executors to do business necessary for the executry estate, is entitled to payment of his account from the other executors, although they have not employed him.(r) But there is no such joint connection between the members of a provisional committee of a projected railway company; and an agent suing for payment of an account incurred by such a committee must not only aver actual employment by each of the members on whom liability is sought to be imposed, but he must also specify the manner in which the employment took place. The mere fact that one has allowed his name to be used as a member of committee, and attended meetings, is not sufficient to infer liability, unless the employment took place at such meetings.(s)

Constructive joint employment.

7. As our law formerly stood, a country agent who employed an agent in Edinburgh,(t) or (in some cases depending

Liability of country agents to town agents.

(q) *Maga. of Glasgow v. Hay*, 11 Feb. 1871, 9 Macph. 520. See also *Barony Parish of Glasgow*, 12 July 1866, 38 Jur. 542.

(r) *Stewart v. Wilson*, 20 May 1823, 2 S. 320 (N. E. 282).

(s) *Campbell v. Lauder's Reps.*, 27 Nov. 1852, 15 D. 117; *M'Ewan v. Campbell*, 6 Dec. 1853, 16 D. 117, affirmed 19 Feb. 1857, 19 D. (H. L.) 12, and 2 Macq. 499. See also *Johnstone v. Scott*, 18 Jan. 1860, 22 D. 393; and *Bright v. Hutton*, 28 June 1852, 3 Clark's House of Lords Cases, 341.

(t) *Greig v. Stewart*, 12 June 1811, 16 F.C. 298; *Robertson v. Winchester*, 19 Dec. 1823, 2 S. 599 (N. E. 512); *Macara v. Philips*, 9 Dec. 1825, 4 S. 296 (N. E. 299); *Gordon v. Sinclair*, 14 June 1826, 4 S. 708 (N. E. 714); *Macqueen and Mackintosh v. Colvin*, 19 Mar. 1827, 4 Mur. 192; *Wallace v. Murdoch*, 25 June 1828, 6 S. 1018; *Mackintosh v. Macdonald*, 21 May 1831, 9 S. 626; *Taylor v. Flowerdew*, 14 Dec. 1836, 15

on local practice) who employed another country agent(*u*) to act for a client, was liable conjunctly and severally with his client in payment of the account so incurred, unless he expressly stipulated that he should incur no personal liability.(*v*) But it is now declared by the Law Agents Act that "a law agent authorised and acting for a client whom he discloses shall incur no liability to any other law agent employed by him, except such as he shall expressly undertake in writing."(*x*) This provision not being retrospective, it applies only to accounts incurred subsequent to the date of the passing of the Act (5th August 1873); and as "law agent" is declared to mean persons entitled to practise as agents in courts of law in Scotland,(*y*) it will not relieve a Scotch agent of his liability to any English attorney or solicitor whom he may employ on behalf of a client;(z) especially as the general rule of English law is that an attorney employing another as agent to do business for his client is *prima facie* liable to the agent for his bill, although the latter knew that the business was done for the client, and that the agent cannot sue the client for his bill of costs.(*a*)

Liability of
client to
town agent
employed
by country
agent.

8. The Law Agents Act does not relieve the clients of country agents of their liability to town agents necessarily or properly employed on their behalf by their country agents; and it is of no consequence whether a client knows or is

S. 263; *Mitchell v. Cullen*, 11 May 1852, 1 Stuart, 718; *Bell v. Izett's Tr.*, 9 June 1854, 16 D. 915.

(*u*) *Kerr v. Marshall*, 3 May 1816, 1 Mur. 59.

(*v*) *Robertson v. Winchester*, 19 Dec. 1823, 2 S. 559 (N. E. 512).

(*x*) 36 and 37 Vict. c. 63, § 21.

(*y*) "The following words and expressions when used in this Act shall have the meanings hereby assigned to them; that is to say, 'Law Agent' shall include Writers to the Signet, Solicitors in the Supreme Courts, Procurators in any Sheriff-Court, and every person entitled to practise as an agent in a court of law in Scotland."—36 and 37 Vict. c. 63, § 1.

(*z*) *Deans and Rodgers v. Hopkirk*, 8 June 1858, 30 Jur. 660, and 20 D. 1097.

(*a*) *Pulling's Law of Attorneys*, 5th ed., p. 447; *Archbold's Chitty's Practice*, 12th ed., p. 157; *Lush's Practice*, 3d ed., vol. 1, p. 345; *Servais v. Whittington*, 3 June 1823, 3 Dowling & Ryland, 195, and 2 *Barnewall & Cresswell*, 11; *Robbins v. Fennell*, 11 Dec. 1847, 17 *Law Journal*, *Queen's Bench*, 77.

ignorant of the name of a town agent so employed.(b) When an Edinburgh agent requests payment of a particular account, and receives a sum accordingly from his country correspondent, he must impute it to that particular account, and so far relieve the client of his liability.(c) Apparently, the claim of an Edinburgh agent against a client will still be held to be assigned or extinguished by a settlement of accounts, including such particular claim, between him and his country correspondent;(d) but even before the passing of the Law Agents Act it was doubtful whether a client, who had paid to his country agent the Edinburgh agent's account was liable to pay it over again to the Edinburgh agent in the event of the country agent's failure.(e)

9. When trustees, or other persons holding a fiduciary character, employ a law agent, they are personally liable in payment of his account,(g) unless they stipulate that the trust-estate alone shall be liable.(h) As the employment of a law agent is, in most cases, within the power of trustees,(i) an appointment by a quorum will be sufficient to bind the trust-estate;(k) but non-concurring trustees will not be personally liable,(l) unless they homologate the appointment.(m)

Liability of
trustees, &c.

(b) *Hamilton v. Thomson*, 21 Oct. 1868, 6 Scot. Law Rep. 14.

(c) *Mitchell v. Cullen*, 11 May 1852, 1 Stuart, 718, and 1 Macq. 190.

(d) *Mackintosh v. Macdonald*, 21 May 1831, 9 S. 626.

(e) *Cullen v. Paterson*, 13 May 1835, 13 S. 747. See also Chapter XVI. on the Triennial Prescription.

(g) *M'Laren on Wills and Succession*, ii., pp. 503 and 546; *Umlin's Office of Trustee*, p. 266; *Fraser on Parent and Child*, p. 276; *Wight's Tr. v. Allan*, 12 Dec. 1840, 3 D. 243; *Worall v. Harford*, 1 Nov. 1802; 8 Vesey, 4; *Lady Lonford v. Mahoney*, 24 April 1843, 4 Drury & Warren, 81. Where it is intended that a trustee shall be liable if there are not sufficient trust-funds, the proper form of decerniture is against him personally, and not *qua* trustee; *Davidson's Tr. v. Carr*, 21 June 1850, 12 D. 1069.

(h) *Scotland v. Henry*, 19 July 1865, 3 Macph. 1125.

(i) 30 and 31 Vict. c. 97, § 2; *M'Laren*, vol. ii. p. 243.

(k) *M'Laren*, vol. ii. p. 188.

(l) 24 and 25 Vict. c. 84, § 1; 26 and 27 Vict. c. 115; *M'Laren on Wills and Succession*, ii. pp. 529 and 532.

(m) *Cunynghame v. Higgins*, 26 June 1802, 4 Pat. App. 401, and 1 July 1816, 6 Pat. App. 244; *Hamilton v. Gibb*, 16 May 1823, 2 S. 315 (N. E. 278); *Graham v. Graham*, 15 June 1827, 5 S. 806 (N. E. 745); *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066; *M'Laren*, vol. ii. p. 503

Confidential
agent of the
trust.

10. If the principle on which the personal liability of trustees to parties whom they employ is founded, be that those who are unacquainted with the amount and security of the trust-funds, are entitled to rely on the credit of the person with whom they contract, it is obvious that trustees ought not to be personally liable to agents or factors standing in a confidential relation towards the trust, so as to have as good an opportunity as the trustees of knowing the security which the estate affords.⁽ⁿ⁾ But the point has never been decided. An agent, however, who suspects that there may be a deficiency in the trust-funds, ought certainly not to run up an account against the trustees without informing them of the state of the funds.^(o)

No direct
claim
against trust
estate.

11. Although trustees are entitled to take credit for law expenses properly incurred and paid by them, the agents whom they employ have no direct claim against the trust-estate or the beneficiaries.^(p)

Liability of
creditors in
sequestra-
tions.

12. It was formerly held that the creditors in a sequestration were primarily liable, as the true debtors, in payment of the account of the agent employed by the trustee, although there was also a right of action against the trustee as the direct employer.^(q) But it is now provided by the Bankruptcy Act of 1856, that "no person shall, by merely lodging an oath and claim, or being ranked or receiving pay-

(n) M'Laren on Wills and Succession, ii. p. 546.

(o) See *Cullen v. Baillie*, 20 Feb. 1846, 8 D. 511, affirmed 19 June 1855, 18 D. (H. L.) 40, and 2 Macq. 80, where trustees were held not personally liable for an account of expenses of trust management of one of their own number, whom they had appointed factor and law agent of the trust chiefly in respect that he was also a beneficiary and well acquainted with the nature and value of the estate.

(p) M'Laren, ii. p. 549; Lewin on Trusts, 5th edition, p. 454; Forsyth on Trusts, p. 445.

(q) *Tod & Wright v. Brydone*, 31 Jan. 1823, 2 S. 175 (N. E. 157); *Malcolm v. Niven*, 5 July 1825, 4 S. 138 (N. E. 140); *Young v. Robertson*, 1 March 1827, 5 S. 502 (N. E. 472); *Johnstone v. Carlyle*, 15 June 1832, 10 S. 657; *Howden's Tr. v. Dunlop & Co.*, 10 Feb. 1835, 13 S. 445; *Gowan*, 19 Feb. 1835, 13 S. 491; *Martin v. A. B.*, 29 May 1835, 13 S. 838; *Brodie v. M'Farlane's Crs.*, 20 Feb. 1846, 8 D. 537; *Ellis v. White*, 12 July 1849, 11 D. 1347.

ment of a dividend, or appearing or voting at a meeting in a sequestration as a creditor, be liable for any claim by the agent or other person employed by the trustee for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate, reserving to the agent or other person so employed right to payment out of the estate, and from the trustee by whom he may have been employed, in so far as the same may be competent to him ;(r) and no trustee shall have relief in respect of such payment against such creditor, reserving to such trustee relief against the estate, and against those creditors or others who may on other grounds be liable in relief.”(s) This provision does not relieve creditors of their liability at common law to an agent directly employed by them ;(t) although even in such a case the agent may lose his claim against the creditors by allowing the bankrupt to obtain his discharge on paying a composition and finding security for his expenses.(u)

13. An agent acting on the employment of a bankrupt has no claim against the creditors, even where his account has been incurred for their benefit, as in the preparation and execution of a trust-deed in their favour.(v) Similarly, persons who have become cautioners for a composition are not

Agent employed by a bankrupt.

(r) It had been previously held that the agent in a sequestration ought to be appointed by the trustee, and not by the creditors ; (*Baillie v. Watson*, 13 June 1822, 1 S. 493, N. E. 459), but that he could not be in any way recognised as an officer in the sequestration ; (*Gourlay v. Stratton*, 15 June 1827, 5 S. 804 (N. E. 743) ; *Wotherspoon v. Laidlaw*, 17 Nov. 1843, 6 D. 88.

(s) 19 and 20 Vict. c. 79, § 57, re-enacting a provision to the same effect in 2 and 3 Vict. c. 41, § 29. Where a trustee sues the creditors for relief from acts which he avers were authorised and sanctioned by them, he must state specifically the circumstances on which he founds as amounting to such authority ; (*Gilmour v. Royal Bank*, 21 Dec. 1855, 18 D. 287. See also *Barclay v. Glendronach Distillery Co.*, 21 Oct. 1868, 7 Macph. 9.

(t) *Ellis v. Connel*, 26 June 1822, 1 S. 528 (N. E. 486).

(u) *Guthrie v. Curl*, 13 May 1825, 1 W. & S. 191.

(v) *Douglas & Ferguson v. M'Kerrel*, 8 Dec. 1814, Hume, 474. As to the liability of a bankrupt who has been discharged on a composition, see *Renton and Grant v. Reid*, 13 May 1823, 2 S. 296 (N. E. 259) ; and *Swan v. Jeffrey*, 15 Jan. 1829, 7 S. 268.

liable in payment of an account subsequently incurred by the bankrupt to his agent, although the employment may have been beneficial to them.(x) A trustee for creditors under a private trust has, however, been held not entitled to avail himself of legal proceedings instituted by the bankrupt, without being liable to the agent for the expenses of them.(y)

Liability of
liquidators
of joint-
stock com-
panies.

14. It has been recently held in England that an official liquidator is not entitled to receive anything out of the assets of a company by way of remuneration until all the costs of the winding up, including the bill of costs of the solicitor employed by him, have been paid in full.(z) Where the liquidator changes his solicitors, their bills of costs fall to be paid rateably as far as the assets will extend, unless the first solicitor has given up documents to the second, on an undertaking that his costs shall be paid out of the estate, in which case his costs are preferable to those of the second solicitor.(a)

Liability of
a consti-
tuent to an
agent em-
ployed by a
factor.

15. A factor duly authorised to employ law agents may of course bind his constituent in payment of an account incurred through such employment.(b) But a ships-husband has no implied authority to bind the owners of a ship for the expenses of a lawsuit.(c)

Married
women
exempt
from lia-
bility.

16. Although a married woman may, with or without her husband's consent, validly appoint a law agent to act for her,(d) yet the general rule of law, that obligations undertaken by a wife *stante matrimonio* are null and void,(e) exempts her, in all but a few exceptional cases, from any liability for an account incurred on her employment.

(x) *Wallace v. Murdoch*, 25 June 1828, 6 S. 1018.

(y) *Paterson v. M'Lelland*, 4 June 1824, 3 S. 103 (N. E. 68). See also *Torbet v. Borthwick*, 23 Feb. 1849, 11 D. 694; and *Davidson's Tr. v. Carr*, 21 June 1850, 12 D. 1069.

(z) *In re Massey*, 19 Feb. 1870, 9 Law Reports, Equity, 367. See also 25 and 26 Vict. c. 89, § 93 (Companies Act, 1862).

(a) *In re Audley Hall Cotton Spinning Co.*, 4 July 1868, 6 Law Reports, Equity, 245.

(b) *Ante*, pp. 107-109.

(c) *Campbell v. Stein*, 5 June 1818, 6 Dow, 116; 1 Bell's Com. 504.

(d) See Chapter IV. p. 79.

(e) *Fraser on the Personal and Domestic Relations*, vol. i. p. 245.

17. The equitable exception to this general rule is, however, well established, that a married woman who is possessed of a separate estate is liable in payment of an account which has been *in rem versum* of her.^(g) Thus, a law agent who had conducted an action at the instance of a married woman without the concurrence of her husband (who was abroad when the action was raised, but who subsequently returned and adopted it), for the purpose of reducing her father's settlement of his heritable and moveable property, was held to have a good claim against the wife or her estate for the expenses incurred in obtaining decree of reduction as to the heritable property, to which she thereby succeeded as heir-at-law, but none for the expenses of the action *quoad* the moveable property, as it would belong to the husband *jure mariti*.^(h) Similarly, where a law agent was employed by a woman to pursue a declarator of marriage, in which he was successful and obtained a decree for aliment, which by using inhibition he made a preferable debt on the heritable estate of the husband, he was held entitled, on the husband's insolvency, to decree against the wife, to the effect of operating payment of his account out of her separate funds.⁽ⁱ⁾ Again, when a law agent, acting on the instructions of a married woman, expedite a service in her favour as heir of her father, and raised a reduction of an opposing service, and of her father's last settlement, by which he had conveyed away from her the great bulk of his property, it was held that, the result of the proceedings being to set up a prior deed by which the property was settled upon her, exclusive of her husband's *jus mariti*, the agent was entitled to decree against her for payment of his account.^(k) In the last case on the subject, a married woman who had a liferent estate, which was declared to be alimentary and from which the

Exceptions.

When wife has a separate estate and the account is *in rem versum*.

(g) Fraser, i. 256.

(h) Brown v. Grahame, 28 May 1830, 8 S. 834.

(i) Gray v. Wyllie, 26 June 1840, 2 D. 1205.

(k) Macara v. Wilson, 15 Feb. 1848, 10 D. 707. It was also held in this case that cash advances made partly to a husband and partly to a wife, to support the general expense of the family, must be presumed to have been made on the husband's credit alone.

jus mariti was excluded, having with the concurrence of her husband raised various actions in regard to the alimentary estate, in which she was ultimately successful, she was held liable in payment of the account of a law agent who had conducted the early proceedings. (l) It must, however, be borne in mind that even when an account of expenses has been *in rem versum* of a married woman, personal diligence against her is incompetent during the subsistence of the marriage. (m)

Other exceptional cases in which married women are liable.

17. A wife is in the same position as an unmarried woman if she has obtained an order of protection under the Conjugal Rights Amendment Act, (n) or if her husband is abroad, or absent and reported to be dead, or if he is civilly dead. (o)

Liability of husband for wife's expenses.

18. A husband is not liable to an agent employed by his wife without his concurrence, except for expenses "necessary to her personal safety, the maintenance of her honour, or the preservation of her status in society." (p) When a

(l) *Gifford v. Rennie*, 26 Feb. 1853, 15 D. 451. As to alimentary funds, see also *Young v. Cooper*, 9 June 1825, 4 S. 81 (N. E. 83); and *Greig v. Christie*, 16 Dec. 1837, 16 S. 242.

(m) *Gray v. Wyllie*, 26 June 1840, 2 D. 1205. See *Scorgie v. Hunter*, 22 Feb. 1872, 9 Scot. Law Rep., as to form of decerniture against a married woman.

(n) 24 and 25 Vict. c. 86.

(o) *Fraser*, vol. i., p. 268; *Bell's Lectures*, p. 124, and cases there referred to.

(p) *Fraser*, vol. i., p. 300. It has been held in England that a husband is liable for expenses incurred by his wife in exhibiting articles of the peace against him, when that step is necessary for her safety (*Shepherd v. Mackoul*, 13 Feb. 1813, 3 Campbell, 326; *Williams v. Fowler*, 23 April 1825, Macclelland & Younge, 269), even although he allows her a separate maintenance; *Turner v. Rookes*, 26 April 1839, 10 Adolphus & Ellis, 47. Where a wife was prosecuted for keeping a disorderly house, her husband, who had been privy to her doing so, and knew by what attorney she was defended, without dissenting to his defending her, was held liable for the expenses of her defence; *Shepherd v. Mackoul*, *supra*. In a recent case (*Wilson v. Ford*, 23 Jan. 1868, 3 Law Reports, Exchequer, 63) the following legal expenses incurred by a deserted wife were held to be necessities for which she had implied authority to pledge her husband's credit during his lifetime, and for which his executors were therefore liable after his death:—(1) Costs and reasonable

wife lives separate from her husband on a settled aliment, an agent conducting legal proceedings on her behalf is not entitled to demand from him payment of expenses incurred in unsuccessful actions against the husband himself, or in actions against third parties, whether successful or not. (q) A husband may of course be subjected, like any third party, to the expenses of a successful action against him at the instance of his wife. But, on the other hand, where the husband is successful, decree for expenses will not be pronounced against the wife, if she has no independent property and the parties are not judicially separated. (r)

19. In consistorial actions between husband and wife, the husband is subjected to an exceptional liability for his wife's expenses, being bound in the ordinary case to supply her with the means of litigation against himself. (s) We now proceed to consider the nature and extent of this liability.

Exceptional liability of husband in consistorial actions.

20. When a husband raises an action of divorce, sepa-

expenses incurred preliminary to the institution of a suit for restitution of conjugal rights, as well as the costs of the suit itself; (2) the expense of obtaining the opinion of counsel on the effect of an antenuptial agreement for a marriage settlement; (3) expenses incurred in consulting attorneys as to the proper mode of dealing with tradespeople who were pressing the wife for payment of various necessary articles supplied to her since her husband's desertion, and also as to a distress threatened by her landlord on furniture belonging to her husband in the house she occupied. See also *Chitty on Contracts*, 9th edition, p. 171; *Baylis v. Watkins*, 23 Jan. 1864, 33 Law Journal, Chancery, 300; and *Richardson v. Du Bois*, 8 Nov. 1869, 5 Law Reports, Queen's Bench, 51.

(q) *Young v. Cooper*, 9 June 1825, 4 S. 81 (N. E. 83).

(r) *Lang v. Lang*, 30 June 1849, 11 D. 1217. See also *Milne v. Milne*, 17 Jan. 1871, 2 Law Reports, Probate and Divorce, 202, where it was held that a wife with separate property is liable, like any other unsuccessful suitor, to be condemned in costs in an action between her and her husband.

(s) In England married women are entitled to a similar privilege in divorce and matrimonial causes; Rules and Regulations for the Court for Divorce and Matrimonial Causes, 26 Dec. 1865, 1 Law Reports, Probate and Divorce, p. 752, sections 158 and 159. See also *Macqueen's Law of Divorce*, second edition, p. 218; *Browne's Practice in Divorce and Matrimonial Causes*, second edition, p. 272.

Action at
husband's
instance
against his
wife.

ration, or adherence, against his wife, he is liable for the whole expenses of a *bona fide* defence, whether she is successful or not; (t) and she is entitled at the very commencement of the action to payment of a sum sufficient for her interim aliment and expenses, and thereafter to any farther advances that may be necessary during the dependence of the action. (u) The action cannot proceed until the husband has paid his wife's expenses awarded against him; but it may proceed notwithstanding of his failure to pay her aliment. (v) When an allowance for expenses has been exhausted, the practice is for the agent to produce an account showing that to be the case, and to move that it be remitted to the auditor for taxation; and after advising the auditor's report, the Lord Ordinary or the Court will award such an additional sum as may seem proper in the circumstances of the case. (x) If the interim awards are insufficient to meet the whole expenses incurred, a motion for the additional expenses ought to be made before the cause is exhausted by decree on the merits; but it has been observed that where no such motion is made, the agent has still his right of action for the expenses. (y) It is a matter for the discretion of the Court, to sustain or to refuse a wife's claim for the expense of reclaiming against an adverse judgment which is adhered to; (z) but such expense is generally allowed as a matter of course. (a) A wife, however, is not entitled to claim a sum to enable her

(t) *Gray v. Mickle*, 10 March 1813, Hume 217; *Taylor v. Taylor*, 17 Nov. 1831, 10 S. 18; *Landale v. Paterson*, 12 June 1834, 12 S. 724; *Dixon v. Dixon*, 17 Feb. 1841, 3 D. 559; *Walker v. Walker*, 27 Jan. 1871, 9 Macph. 460; *Lothian's Consistorial Law*, p. 128; *Shand's Practice*, p. 429.

(u) *Fraser*, vol. i., pp. 441 and 704; *Shand's Practice*, p. 429; and cases *supra*.

(v) *Dixon v. Dixon*, 17 Feb. 1841, 3 D. 559. See also *Keane v. Keane*, 13 Dec. 1872, 3 Law Reports, Probate and Divorce, 52.

(x) *Lothian's Consistorial Law*, p. 128.

(y) *Muirhead v. Muirhead*, 19 March 1861, 23 D. 757. See also *Harman v. Macalister's Trs.*, 6 July 1826, 4 S. 799 (N. E. 806).

(z) *Donald v. Donald*, 30 Mar. 1863, 1 Macph. 741.

(a) *Gow v. Gow*, 21 Feb. 1855, 17 D. 477.

to carry on an appeal to the House of Lords. (b) When a wife allows decree to be pronounced against her in absence, and thereafter raises a reduction of the decree, she cannot as a matter of right claim her expenses in the reduction; (c) though a different practice formerly prevailed when reduction was one of the ordinary modes of bringing under the review of the Court of Session the judgment of the Commissary Court. (d) In a recent case, after decree of divorce had been pronounced by the Lord Ordinary in an action at the instance of the husband, and during the dependence of a reclaiming note against the judgment, the wife raised a counter action of divorce against her husband, and the Court held that he was bound to provide funds to meet his wife's expenses therein. (e)

21. When a husband raises an action of declarator of nullity of marriage, on the ground of a previous marriage subsisting on the part of the wife, she seems entitled in the first instance to the same privileges, in regard to interim aliment and expenses, as a wife defending an action of divorce; and it has been so held in England. (g) In the only Scotch case in which the question was raised, the Lord Ordinary granted to the defender several awards of aliment and expenses, but after a proof he decided in favour of the pursuer, and refused the defender's motion for expenses in so far as not already decerned for. During the dependence of a reclaiming note, the defender presented a note to the Court, praying for a sum to enable her to carry on the action; but this was refused, in respect that the previous awards were sufficient. (h)

Declarator
of nullity of
marriage at
husband's
instance.

(b) *King v. King*, 11 March 1843, 15 Jur. 393. As to expenses in an appeal at the husband's instance, see *Paterson v. Paterson*, 2 March 1849, 11 D. 905, and 9 Aug. 1850, 7 Bell's App. 337.

(c) *Stewart v. Stewart*, 27 Feb. 1863, 1 Macph. 449.

(d) *Delamotte v. Jardine*, 9 Feb. 1789, M. 447; *Allsopp v. Allsopp*, 9 July 1830, 8 S. 1032.

(e) *Walker v. Walker*, 27 Jan. 1871, 9 Macph. 460. On the other hand, see *Craig v. Craig*, 1 June 1852, 14 D. 829.

(g) *Bird v. Bird*, 19 Feb. 1753, 1 Lee, 209; *Browne's Practice in Divorce and Matrimonial Causes*, second edition, p. 275.

(h) *Ballantyne v. Ballantyne*, 1 Dec. 1865, 38 Jur. 64, and 4 Macph. 494.

Exceptional cases where husband not liable.

22. Even in the case of a divorce, the rule, that a wife is entitled to be defended at her husband's expense, rests, not upon her absolute right, but only upon a very general practice; and in exceptional cases the Court may refuse to award her expenses.⁽ⁱ⁾ As the rule is founded on the presumption that the wife is destitute, and consequently incapable of litigating at her own expense, it is open to an equitable exception in the case of the wife having a separate estate or income sufficient both for her maintenance and the payment of expenses. In such circumstances she is not entitled to any payments *pendente lite*; but may, of course, be found entitled to expenses if the ultimate decision is in her favour.^(k) In one case, a husband living in a state of voluntary separation from his wife, against whom he brought an action of divorce in which he was successful, was held liable for the account of an English solicitor employed by the wife in relation to her defence and other matters in which she required legal assistance, although he allowed her £30 per month, besides paying for her lodgings.^(l) When the husband is on the poor's roll, he is not bound to pay such expenses of his wife's defence as may be avoided by her going on the poor's roll also; but he must pay such as are not covered by that privilege.^(m) It is, however, not sufficient to exempt a husband from the ordinary liability that he is in destitute circumstances, and applying for the benefit of the poor's roll.⁽ⁿ⁾

Co-defender's liability.

23. In an action of divorce at the instance of a husband against his wife on the ground of adultery, a co-defender cited under the Conjugal Rights Amendment Act^(o) may be

(i) *Stewart v. Stewart*, 27 Feb. 1863, 1 Macph. 449.

(k) *Pitt v. Pitt*, 8 June 1861, 24 D. 1444; Macqueen's Law of Divorce, second edition, p. 223; Browne's Practice in Divorce and Matrimonial Causes, second edition, p. 276; *Jones v. Jones*, 19 Jan. 1872, 2 Law Reports, Probate and Divorce, 202. See also *Macfarlane v. Macfarlane*, 24 June 1844, 16 Jur. 521, and 11 March 1848, 10 D. 962.

(l) *Harman v. Macalister's Trs.*, 6 July 1826, 4 S. 799 (N. E. 806).

(m) *M'Gregor v. M'Gregor*, 8 July 1841, 3 D. 1191.

(n) *Baxter v. Baxter*, 28 May 1845, 7 D. 639.

(o) 24 and 25 Vict. c. 86, § 7.

decerned against, not only for the expenses incurred by the husband in carrying on the action, but also for those which the husband has been obliged to pay for the defence of his wife.(p)

24. In consistorial actions at the instance of a wife against her husband, the general rule is that he is liable for her expenses.(q) But the wife's agent ought to keep himself in funds by obtaining interim awards during the progress of the proceedings; otherwise he may not be able to recover payment from the husband, if the wife is ultimately unsuccessful, or if she abandons the action.

Action at wife's instance against her husband.

Formerly the rule was that no expenses could be allowed until the wife had made out a *sempilena probatio*.(r) But it is now competent to give an interim award to account of expenses *in initio litis*;(s) and when the sum so awarded has been properly expended, another advance may be obtained.(t) The matter is, however, entirely within the discretion of the Court, each case depending on its own circumstances.(u) Where a wife has an ample estate of her own, she cannot claim any payments *pendente lite*;(x) but in one instance, where the separate estate was scarcely sufficient for the wife's maintenance, interim decree was pronounced for £150 in name of aliment and expenses, without prejudice to the husband's claim for repetition.(y) When a

Interim award may be given in *initio litis*.

(p) *Andrews v. Andrews and Stirling*, 7 Feb. 1873, 10 Scot. Law Rep. 251.

(q) *Fraser*, vol. i. p. 703; *Shand's Practice*, p. 430.

(r) *Fraser*, vol. i. p. 704; *Lothian's Consistorial Law*, p. 129. See also *T. v. D.*, 27 Feb. 1866, 1 Law Reports, Probate and Divorce, 127; and *Ditchfield v. Ditchfield*, 4 June 1869, ib. p. 729.

(s) *Vair v. Munro*, 11 March 1841, 16 F. 884; *Tibbetts v. Tibbets*, 25 Feb. 1862, 24 D. 599; *Crombie v. Crombie*, 19 May 1868, 6 Macph. 776; *Walker v. Walker*, 27 Jan. 1871, 9 Macph. 460.

(t) *Fraser*, vol. i. p. 704; *Lothian's Consistorial Law*, p. 128.

(u) *Currie v. Currie*, 6 Dec. 1833, 12 S. 171; *Shand's Practice*, p. 430; and cases there referred to.

(x) *Macfarlane v. Macfarlane*, 24 June 1844, 16 Jur. 521; *Macquenn's Law of Divorce*, second edition, p. 223; *Browne's Practice in Divorce and Matrimonial Causes*, second edition, p. 276.

(y) *Macfarlane v. Macfarlane*, 11 March 1848, 10 D. 962.

wife fails to support, upon appeal to the House of Lords, a decree obtained in the Court of Session against her husband, she is not entitled to her costs in the appeal; but the reversal of the judgment will not be extended to that part of it which gave her the expenses in the Court of Session.(z)

Declarator
of mar-
riage at a
woman's
instance.

25. A woman pursuing a declarator of marriage is not entitled to interim aliment or law expenses, except in very peculiar cases, where there can be almost no doubt of her ultimate success.(a) But when the Lord Ordinary has found the marriage proved, and the defender has reclaimed to the Inner House, the pursuer may obtain an interim award of expenses to enable her to defend the judgment in her favour.(b)

Expenses
awarded at
final judg-
ment.

26. When a wife is ultimately successful in a consistorial action against her husband, her agent is of course entitled to receive from him payment of her expenses, under deduction of any sums paid under interim awards;(c) and it was even held in an old case that the agent of a woman who had obtained decree in a declarator of marriage was entitled to sue the husband for expenses incurred in the necessary conduct of the cause, over and above what was taxed as the proper expenses of process.(d) This decision, however, can scarcely be regarded as now authoritative; as it is quite settled that, in the case of ordinary litigants, an action to recover extrajudicial expenses, which have not

(z) *Paterson v. Paterson*, 9 Aug. 1850, 7 Bell's App. 337.

(a) *Campbell v. Sassen and Mackenzie*, 23 May 1826, 2 W. & S. 309; *Browne v. Burns*, 30 June 1843, 5 D. 1288; *Fleming v. Corbet*, 18 Dec. 1858, 21 D. 179.

(b) *Forster v. Forster*, 18 Feb. 1869, 7 Macph. 546. In this case the Court eventually found the marriage proved; and the defender having appealed to the House of Lords, interim execution pending appeal was allowed to the effect of enabling the pursuer to recover the arrears of aliment due to her. As, however, the interlocutor decerning for payment of expenses in name of the agent-disburser was not appealed against, interim execution of the decree was refused as unnecessary; 16 June 1871, 9 Macph. 829.

(c) *Macgregor and Barclay v. Martin*, 12 March 1867, 5 Macph. 583.

(d) *M'Alister's Agent v. M'Alister*, 18 Nov. 1762, M. 4036; *Lothian's Consistorial Law*, p. 89.

been allowed in a former action, is incompetent.(e) On the other hand, when the wife is unsuccessful, it is a matter for the discretion of the Court to sustain or refuse her claim for expenses;(g) and if her expenses are not allowed, her agent is not entitled to sue the husband for the amount, as being liable for the wife's debts.(h) When the action has been abandoned or compromised by the wife, it is not quite clear whether her agent has any recourse against the husband. But if the action has proceeded so far as to be virtually decided in the wife's favour, the agent will be allowed to sist himself as a party, and to obtain decree in his own name against the husband for the expenses of process.(i) This remedy, however, will be denied to the agent, if the action is abandoned before the wife's averments have been substantiated.(k) In a recent English case it was held that the costs of a solicitor employed by a married woman to institute proceedings against her husband, for the purpose of obtaining a judicial separation, were not necessities for which the husband was liable, unless at least there was

(e) *M'Dowall v. Stewart*, 1 Dec. 1871, 10 Macph. 193.

(g) *Craig v. Craig*, 1 June 1852, 14 D. 829. The English rule is now the same; *Jones v. Jones*, 19 Jan. 1872, 2 Law Reports, Probate and Divorce, 333. See also *Heal v. Heal*, 20 Feb. 1867, *ib.* vol. i. p. 300. When the decision is against the wife, she ought to make her application for costs at the time of hearing or trial; Rules and Regulations for the Court for Divorce and Matrimonial Causes, § 159, 1 Law Reports, Probate and Divorce, 752; but the rule is not imperative; *Conradi v. Conradi*, 6 March 1866, 1 Law Reports, Probate and Divorce, 163; though the Court cannot condemn a party in costs after a decree has been made absolute in a suit for dissolution of marriage; *Wait v. Wait*, 21 March 1871, 2 Law Reports, Probate and Divorce, 228.

(h) *Young v. Cooper*, 9 June 1825, 4 S. 81 (N. E. 83); *Fraser*, vol. i., p. 704; *Lothian's Consistorial Law*, p. 129.

(i) *Macgregor & Barclay v. Martin*, 12 March 1867, 5 Macph. 583. See also Chapter XIV.

(k) *Smith v. Smith*, 21 Feb. 1871, 9 Macph. 538. See, however, the English case of *Dixon v. Dixon*, 25 April 1871, 2 Law Reports, Probate and Divorce, 253, where a wife who had raised a suit for the dissolution of marriage having returned to cohabitation, an application by the husband for the dismissal of the suit was ordered to stand over until the wife's attorney had an opportunity of getting his costs taxed, and enforcing them against the husband.

great probability of ultimate success, and the solicitor had made proper investigation and inquiry into all the circumstances of the case before he commenced the proceedings.^(l)

Husband
not liable
for every
disburse-
ment autho-
rised by
wife.

27. When a husband is obliged to pay his wife's expenses in consistorial actions, he is not necessarily liable for all the disbursements that she may have authorised, but only for such as are reasonable and proper.^(m)

^(l) *Baylis v. Watkins*, 23 Jan. 1864, 33 Law Journal, Chancery, 300.

^(m) See Chapter XII., *post*, p. 175.

CHAPTER XII.

TAXATION OF ACCOUNTS AS BETWEEN AGENT
AND CLIENT.

1. A law agent who renders a business account to a client, thereby offers to accept the amount stated in it; but the client is not obliged to pay the account, until it has been taxed. The right to insist on the taxation of an agent's account can be foreclosed only by the most express waiver; (a) and it is competent, not only to the party on whose employment the agent has acted, but also to his creditors, (b) or other persons chargeable with the account, or interested in the estate out of which it falls to be paid. (c) On the other hand, if an agent in rendering his accounts offers to make a deduction provided the balance is remitted by a certain day, and the client does not timeously adopt the proposal, the agent is entitled to full payment of his account, subject to taxation. (d) When a client insists on taxation of an

Client may
insist on
account
being taxed.

(a) *M'Laren v. Manson*, 4 Dec. 1857, 20 D. 218. See also *Court v. Mackintosh*, 20 Nov. 1832, 11 S. 62. In England the taxation of the bills of attorneys and solicitors is regulated entirely by statute (6 and 7 Vict. c. 73, §§ 37-43); and there are therefore no English decisions on the subject of any authority in Scotland. See *Pulling's Law of Attorneys*, 5th edition, p. 329; and also 33 and 34 Vict. c. 28, § 15, as to the exemption from taxation of special agreements regarding the amount of remuneration.

(b) *Gray v. Graham*, 21 May 1851, 13 D. 963; affirmed on this point 14 Aug. 1855, 18 D. (H. L.) 52, and 2 Macq. 435.

(c) *Macdonald v. Macdonald*, 22 Feb. 1856, 18 D. 630. See also the English statute, 6 and 7 Vict. c. 73, § 38, and *Pulling's Law of Attorneys*, 5th ed., p. 343.

(d) *Cullen v. Mitchell*, 19 June 1850, 22 Jur. 646. See also *Cullen*

account, or by not paying renders legal proceedings necessary for its recovery, the agent is entitled to remodel the account and increase the amount; (e) but this is not regarded as a very creditable course in ordinary circumstances. (g)

A client
may waive
his right.

2. A client may, of course, agree to settle his agent's accounts without having them taxed; but as the parties do not meet on equal terms, the law is somewhat jealous of such settlements. (h) Thus, minutes of trustees stating that the accounts of the law agent for the trust had been exhibited and approved of, and specifying the balance due by the trust-estate, have been held not to bar the opening up and taxation of the accounts. (i) But a client is not entitled to insist on taxation, if he has entered, in the full knowledge of his legal right, into any sort of compromise with his agent. (k) And when a law agent renders his accounts regularly for a long period, a client who makes partial payments, without stating any objection to their accuracy, may be barred from afterwards objecting that they have not been

v. Wright, 30 March 1863, 1 Macph. 734, where an agent having agreed to take a bill for £85 as full payment of untaxed accounts, amounting to £120, and the bill not having been paid when it fell due, on account of the agent having used arrestments, he was held barred from founding on the delay in payment as annulling the agreement.

(e) *M'Aulay v. Adam*, 7 May 1835, 1 S. & M'L. 665; *Court v. Macintosh*, 20 Nov. 1832, 11 S. 62; *Macdonald v. Macdonald*, 22 Feb. 1856, 18 D. 630; *Broatch v. Jenkins*, 23 July 1867, 4 Scot. Law Rep. 235; *Hamilton v. Ferrier*, 3 Dec. 1868, 6 Scot. Law Rep. 151. See, however, *Gordon v. Innes*, 16 May 1826, 4 S. 577 (N. E. 585).

(g) *Per* Lord Brougham in *M'Aulay v. Adam*, *supra* (e).

(h) The law of England now allows the remuneration of attorneys and solicitors to be fixed by agreements exempt from taxation; 33 and 34 Vict. c. 28.

(i) *Mackenzie v. Mackenzie's Trs.*, 14 June 1831, 9 S. 730. See also *M'Laren v. Manson*, 4 Dec. 1857, 20 D. 218.

(k) *Scott v. M'Queen & Mackintosh*, 31 Jan. 1822, 1 S. 281 (N. E. 261); *M'Ara v. Gilfillan*, 4 June 1831, 9 S. 684; *Colvil v. Jameson*, 16 Feb. 1839, 1 D. 526. *In re Whitcombe*, 9 Nov. 1844, 14 Law Journal, Chancery, 19. See also *Johnston v. M'Kenzie*, 26 Nov. 1824, 3 S. 321 (N. E. 228); *Fraser v. Fraser*, 14 Feb. 1827, 5 S. 348 (N. E. 323); *Turner v. Simson*, 20 Dec. 1838, 1 D. 57.

taxed.^(l) But, generally speaking, a distinction is to be drawn between an *interim* or partial settlement during the currency of an account, and a final settlement at its close.^(m) In the former case, a client making a payment or granting a bill is not thereby precluded from afterwards insisting on the account being taxed;⁽ⁿ⁾ while, in the latter, he must be held to have waived his right if, without making any demand that the account should be taxed, he pays it,^(o) or grants a bill for the amount,^(p) or assigns a debt from which the agent recovers payment.^(q) But taxation is not excluded, if an agent pays himself the amount of his untaxed business accounts out of money recovered on behalf of his client.^(r)

3. An agent ought not to take decree in absence against a client for the amount of his accounts without having them taxed;^(s) for such decree will not bar the client's creditors from insisting on their being opened up and audited,^(t) although it may be taken, along with other circumstances, as proving acquiescence on the part of the client himself.^(u)

Accounts should be taxed before decree in absence.

(l) *Clyne v. Swanson*, 26 Jan. 1830, 8 S. 391. See also *Colvil v. Jameson*, 16 Feb. 1839, 1 D. 526.

(m) *Fraser v. Smart*, 22 Nov. 1834, 13 S. 78.

(n) *Megget v. Douglas*, 2 March 1826, 4 S. 514 (N. E. 521). See also *M'Laren v. Manson*, 4 Dec. 1857, 20 D. 218.

(o) *M'Michie v. Philips*, 7 July 1826, 4 S. 803 (N. E. 810); *Macdonnell v. Mackenzie*, 26 June 1829, 7 S. 798. The English rule is that taxation of a bill after payment can be insisted on only in special circumstances, and provided the application is made within twelve calendar months after payment; 6 and 7 Vict. c. 73, § 41; *Binns v. Hey*, 22 Nov. 1843, 13 Law Journal, Queen's Bench, 28.

(p) *Stewart v. Lang*, 15 Jan. 1861, 23 D. 286; *Fraser v. Stuart*, 22 Nov. 1834, 13 S. 78; *Neilson v. Morrison*, 16 June 1836, 14 S. 974. See also *Stein's Assignees v. E. of Mar*, 13 Nov. 1827, 6 S. 1, and 7 S. 699, foot-note.

(q) *Macdonnell v. Mackenzie & Mann*, 6 Feb. 1823, 2 S. 185 (N. E. 165).

(r) *Henderson v. Jackson*, 15 July 1852, 14 D. 1040.

(s) A. S. 6 Feb. 1806.

(t) *Gray v. Graham*, 21 May 1851, 13 D. 963, affirmed on this point, 14 Aug. 1855, 18 D. (H. L.) 52, and 2 Macq. 435.

(u) *Fraser v. Smart*, 22 Nov. 1834, 13 S. 78; *Neilson v. Morrison*, 16 June 1836, 14 S. 974. Under the Court of Session Act of 1868, a decree

Opening up
of docketed
accounts.

4. When accounts have been settled and docketed as correct, a law agent is not entitled to make additional charges, such as commission.(x) The client, on the other hand, can reduce the settlement,(y) and have the accounts taxed, only in exceptional circumstances. It is a relevant ground of reduction that the client's signature has been fraudulently obtained,(z) or that the agent has been guilty of gross and fraudulent overcharges;(a) but in the latter case, the overcharges must be particularly specified.(b) A client is also entitled to reduce docketed accounts subscribed by him in ignorance of the legal rule which prohibits trustees from making any profit out of the trust-estate,(c) and any transaction by which, in ignorance of his real liability, he has made a present to his agent.(d) Even when accounts have been settled so as to exclude taxation, they may be opened

in absence becomes entitled to all the privileges of a decree *in foro* as against the defender, if the summons is personally served upon him, or he has entered appearance, upon the lapse of sixty days after the expiry of a charge upon it which is not brought under review by suspension; 31 and 32 Vict. c. 100, § 24.

(x) *Tod's Trs. v. Melville*, 5 Feb. 1836, 14 S. 432.

(y) Reduction is the proper remedy; *Colvil v. Jameson*, 16 Feb. 1839, 1 D. 526.

(z) *Turner v. Tunnock's Trs.*, 29 Jan. 1864, 2 Macph. 409.

(a) *Macdonell v. Mackenzie & Mann*, 6 Feb. 1823, 2 S. 185 (N. E. 165); *Clyne v. Swanson*, 26 Jan. 1830, 8 S. 391; *Wilkinson v. Foster*, 31 Jan. 1823, 7 Moore, 496; *Nokes v. Warton*, 17 Dec. 1842, 5 Beavan, 448; *In re Barrow*, 3 Dec. 1853, 17 Beavan, 547; *In re Dickson*, 8 Dec. 1856, 26 Law Journal, Chancery, 89; *In re Strother*, 15 July 1857, 26 Law Journal, Chancery, 695.

(b) *Macdonell v. Mackenzie & Mann*, *supra* (a); *Elder v. Smith*, 27 May 1829, 7 S. 656; *Macdonnell v. Mackenzie*, 26 June 1829, 7 S. 798; *In re Thompson*, 29 Jan. 1845, 8 Beavan, 237; *In re Bennet*, 15 July 1845, 14 Law Journal, Chancery, 403; *Shrewsbury & Leicester Railway Co. v. Vardy*, 28 Jan. 1851, 20 Law Journal, Chancery, 325. See also *Campbell v. Montgomerie*, 30 May 1822, 1 S. 446 (N. E. 413); *Smith v. Watt's Trs.*, 20 Jan. 1854, 16 D. 372; *Laing v. Laing*, 17 July 1862, 24 D. 1362.

(c) *Lauder v. Millar*, 15 July 1859, 21 D. 1353. See also Chapter XIX.

(d) *Long v. Taylor*, 8 June 1821, 1 S. 58 (N. E. 59); affirmed 28 May 1824, 2 S. App. 233. See also Chapter XVII.

up, to the effect of correcting an *error calculi*, or a clerical blunder.(e)

5. The liability to taxation does not extend to every kind of claim of a law agent against a client, but is confined to business accounts. Thus, the accounts of a private factor cannot be audited under the authority of the Court.(g) Accounts of expenses in judicial proceedings were formerly taxed by the Court,(h) but they are now almost invariably remitted for taxation to the auditor of the court in which the proceedings have taken place.(i) It is, however, competent for the Court to modify an agent's account, without remitting it to the auditor;(k) and a judicial referee who is empowered to award expenses may, if he see fit, award to either party a lump sum in name of expenses, without having the account taxed by the auditor.(l) The Court of Session may remit an account for proceedings in an inferior court, either to the auditor of the Court of Session, or to the auditor of the inferior court, as may seem expedient.(m) Accounts incurred by a trustee in a sequestration must be taxed either by the auditor of the Court of Session, or by the auditor of the sheriff-court of the county in which the sequestration has been carried on, as may be directed by a general meeting of the creditors.(n) The Accountant of Court, it is understood, has laid down a rule by which the accounts incurred to law agents all over Scotland, in connection with judicial factories and other matters falling under

Business accounts are remitted to auditor for taxation.

(e) *M'Ara v. Gilfillan*, 4 June 1831, 9 S. 684; *Colvil v. Jameson*, 16 Feb. 1839, 1 D. 526. See also *Forbes' Trs. v. Edinburgh & Glasgow Union Canal Co.*, 13 Jan. 1834, 12 S. 365; *Walker v. Drummond*, 18 May 1836, 14 S. 780; *Brown v. Graham*, 12 July 1849, 11 D. 1330; *Findlay, Bannatyne, & Co.'s Assignee v. Donaldson*, 3 March 1860, 22 D. 937, and 29 July 1865, 2 Macph. (H.L.) 86; *Law v. Liddell's Trs.*, 22 Feb. 1862, 24 D. 577; *Laing v. Laing*, 17 July 1862, 24 D. 1362.

(g) *Baxter*, 5 Feb. 1828, 6 S. 487.

(h) See *Shand's Practice*, p. 1020.

(i) A.S. 6 Feb. 1806; A.S. 10 July 1839, § 110.

(k) *Guthrie v. M'Eachern*, 14 Dec. 1826, 5 S. 135 (N. E. 124).

(l) *Hilton v. Walkers*, 2 July 1867, 5 Macph. 969.

(m) *Christie v. Douglas*, 20 Feb. 1830, 8 S. 582.

(n) 19 and 20 Vict. c. 79, § 154.

his official jurisdiction, must be taxed and reported on by the auditor of the Court of Session. The taxation by local auditors is not recognised by the Accountant of Court; and ignorance of this rule frequently necessitates two taxations, one by the local auditor, which is not recognised, and a subsequent one by the auditor of the Court of Session, which alone is. The bill of an English solicitor, for conducting a lawsuit in an English court, will be remitted for taxation to the taxing master of that court.(o)

Employment must be proved or admitted before accounts are remitted to auditor.

6. When a law agent raises an action for payment of his account, and the defence consists in a denial of employment, the Court will not in general remit the account to the auditor till employment has been proved. But in one case, where the plea of non-employment applied only to part of the accounts sued for, the Court, before answer, remitted to the auditor, as auditor, and also as accountant and commissioner, to examine the accounts, and hear parties thereon.(p)

Proceedings at, and scales of, taxation.

7. When an account of expenses has been remitted to the auditor, he fixes a particular time for the taxation, at which both parties or their agents are required to attend. If either of the parties fails to attend, the taxation proceeds *ex parte*, and the absent party is not entitled thereafter to state objections to the account or to the auditor's report.(q) Accounts for judicial proceedings fall to be taxed according to the table of fees and the regulations of the court in which the proceedings have taken place.(r) In the sheriff-court

(o) *Deuhurst v. Gardiner*, 24 March 1853, 2 Stuart, 336; *Deans & Rodgers v. Hopkirk*, 8 June 1858, 20 D. 1097, and 30 Jur. 660.

(p) *Campbell & Mack v. Ewing*, 29 Nov. 1832, 11 S. 143.

(q) *Mackenzie v. Williamson*, 27 Jan. 1842, 14 Jur. 216, and 4 D. 469. See also the English statute 6 and 7 Vict. c. 73, § 37.

(r) *Sinclair v. Bryson*, 16 June 1825, 4 S. 97 (N. E. 99). The fees for judicial proceedings in the sheriff-courts are now regulated entirely by A.S. 1 March 1861, and table thereto annexed. The basis of the existing fees for proceedings in the Court of Session is the table sanctioned by A.S. 19 Dec. 1835, to be acted on as an interim table for three years from 12 Jan. 1836. This table was renewed by A.S. 15 May 1839, and, with certain additions and alterations, made perpetual by A.S. 17 July 1841. Further alterations and additions have been made by A.S. 7 July 1858, and A.S. 18 March 1870. See Appendix.

there are three scales of taxation, depending on the amount of the sum concluded for,(s) or, if the sheriff see cause, on the amount actually decerned for;(t) and in the ordinary case only small-debt fees are allowed when the demand does not exceed the sum which may be competently concluded for in the Small-Debt Court.(u) There is only one scale of taxation in the Court of Session; but in the exercise of his discretion in allowing or disallowing charges, the auditor is of course entitled to take into consideration the magnitude of the interests at stake. Charges for conveyancing and other extrajudicial work are regulated by scales of fees adopted by the various legal bodies, and recognised by the auditors of the supreme and inferior courts.(x) Disbursements must, of course, be properly vouched;(y) but the taxation of old accounts which

(s) "There shall be three scales of taxation, viz.—*First*, for causes where the amount of principal and past interest concluded for does not exceed £25; *Second*, for causes where the amount concluded for, as aforesaid, exceeds that sum, but does not exceed £100; and *Third*, for causes where the amount concluded for, as aforesaid, exceeds £100."—A.S. 1 March 1861, § 1. These rates of charge are applicable to the taxation of accounts as well between agent and client as between party and party; § 14.

(t) The scale for taxation shall in the ordinary case be determined by the amount concluded for; but it shall be competent for the Sheriff, if he see cause, to direct the amount to be taxed according to the scale applicable to the amount decerned for; this, however, shall not affect the ordinary power of the Sheriff to declare that such expenses shall be subject to modification."—A.S. 1 March 1861, § 3.

(u) "Where the demand does not exceed the sum which may be competently concluded for in the Sheriff's Small-Debt Court, no fees shall be allowed except those authorised by the Act 1st Vict. c. 41, unless the Sheriff see cause to the contrary (see sec. 36 of that Act); it being always competent to the Sheriff, when a case is removed from the Small-Debt Court to the Ordinary Court, or at any subsequent stage of the process, to determine whether it is to be conducted and charged for according to the annexed tables, or on the principle that no other or higher fees are to be taken than those allowed by 1st Vict. c. 41."—A.S. 1 March 1861, § 2. See also *ante*, p. 69.

(x) *Galloway v. Ranken*, 11 June 1864, 2 Macph. 1199. See also Chapter IX., p. 121.

(y) "Auditors shall not allow charges for payments to officers, or other outlay, unless vouchers be produced."—A.S. 1 March 1861, § 13.

have been periodically rendered, though not taxed at the time, will not be conducted on such strict principles as in the case of accounts recently incurred.(z) Expenses needlessly incurred, whether professional charges or disbursements, are not allowed against a client unless he has expressly sanctioned them in the knowledge that in no case could he recover them from the opposite party.(a) The

"Receipts or vouchers for all sums stated as paid to witnesses shall be produced to the auditor at the taxation of the account, otherwise the same shall not be allowed."—A.S. 10 July 1841, § 5.

"In all cases where memorials are laid before counsel, the fee paid therewith, together with the date of payment, shall be marked on the back in large legible characters (in words), and the paper shall be afterwards got back from the counsel, with his signature or initials indorsed thereon, which shall be produced to the auditor at the taxation of the account as the voucher of the fee stated for counsel; otherwise neither the charge for the memorial nor fee shall be allowed. In cases where fees are paid to counsel without a memorial, a certificate under the hand of counsel or his clerk shall, if required, be produced, that such fees were actually and *bona fide* paid of the dates stated in the account; nor shall a party, upon any account, be allowed to pay or state higher or additional fees to counsel, after he has been found entitled to expenses, than were actually paid at the time. But this rule shall not apply either to cases on the Poor's Roll, or to such as have been conducted gratuitously by the agent and counsel, on account of the poverty of the party."—A.S. 19 Dec. 1835. See also A.S. 6 Feb. 1806, and A.S. 11 July 1828, § 60.

(z) *D. of Queensberry's Exrs. v. Tait*, 23 May 1822, 1 S. 428 (N. E. 398); and 5 July 1825, 4 S. 145 (N. E. 146). See also *Rose v. M'Leay's Trs.*, 9 July 1830, 8 S. 1037; 7 May 1833, 11 S. 546; 22 May 1834, 12 S. 631; affirmed 14 July 1837, 2 S. & M'L. 958.

(a) "In all cases the Sheriff may disallow all charges for entire papers or parts of papers, or for steps of procedure or agency, which appear to him to have been irregular or unnecessary."—A.S. 1 March 1861, § 4.

"If an agent shall necessarily go to the country to attend a proof, the examination of parties, or other business, he shall be allowed for the time occupied in such business (including travelling), at the same rate," &c. (As to the amount now allowed, see A.S. 18 March 1870.) "But when the business may be properly performed by an agent in the country, the auditor, in taxing an account, shall only allow such expenses as would have been incurred if it had been done by a country agent."—A.S. 19 Dec. 1835.

"No letters shall be allowed except such as are essentially necessary

auditor is empowered to hear the parties or their agents, but not in writing, before allowing or disallowing any items objected to. (b)

8. In regard to the expenses of joint proceedings in the Court of Session, "the universal practice in ordinary actions has always been that an agent acting for a number of defenders in a case at the instance of a single pursuer, is only entitled to make the same charges as if he acted for one only, and that whether joint or separate defences, or partly separate and partly joint defences, have been lodged; though, in the case of separate defences having been necessarily or justifiably stated, the agent is of course entitled to charge for all the additional expenses arising from the separate appearance made by the different defenders, as well as for the share or proportion applicable to each, of the common expenses incurred for the whole. This rule has always been applied equally in taxations between an agent and his clients, as in those between parties in a suit where expenses have been found due to one or other of them. . . . But a somewhat different practice has prevailed in processes of multiplepoinding. That form of process, as mentioned by Mr Bell in his Commentaries, has been looked upon as equivalent to a congeries of actions, and on that account (the auditor supposes) the practice has been to allow to an agent who acts for separate claimants, having separate and distinct grounds of claim on the fund *in medio*, separate fees for each, as if in a separate process; but even this rule of practice is not held to be applicable to questions or discussions on the same points arising between all or several of the claimants on the one hand, and the raiser on the other. In such circumstances, the usual practice is for the Lord Ordinary to appoint a common agent to act for all the claimants, who is

Expense
joint pro-
ceedings in
the Court of
Session.

for conducting a cause, or communicating information as to important interlocutors or steps of procedure.

"The agent's letter book shall be produced to the auditor, if required, to show the length or propriety of the letters stated in an account, and no letter shall be allowed which is not fully booked."—A.S. 19 Dec. 1835.

(b) A.S. 6 Feb. 1806; Shand's Practice, pp. 343 and 1021.

only allowed to charge as if he acted for one party.”(c) But although a law agent jointly employed by several parties is not entitled to make higher charges than if he acted for only one, yet, in the absence of an express stipulation to the contrary, he may sue any one of them for the whole amount of his account, leaving him to operate his relief against the others.(d)

Joint proceedings in the sheriff-court.

9. The Act of Sederunt regulating the charges of practitioners in the sheriff-courts (1 March 1861, § 10) makes the following provision in regard to the expenses of joint proceedings:—“In actions where there are more defenders than one, pursued for different debts, or summoned to remove from different premises, full charges for writings will be allowed for the highest of the rents or sums charged for,—one-fourth only of the ordinary fees will be allowed on each of the other rents or sums,—and the whole amount will be apportioned among the different defenders according to the debts for which they are respectively sued, or the rents of the premises from which they are respectively summoned to remove. But in such cases the procurator will be allowed to charge one-half only of the fees, under Art. 12 of the Table, against each defender, according as the amount of his debt, or the rent of the subject from which he is summoned to remove, falls under Scale I., II., or III.”

Double agency not allowed.

10. When both a country agent and an Edinburgh agent have been employed in conducting a cause, double charges are not allowed for doing the same business.(e) This rule

(c) Auditor's Report in *Greenhill v. Gladstone*, 7 June, 1861, 23 D. 1006. See also *Edinburgh and Glasgow Railway Co. v. Arthur*, 24 Feb. 1858, 20 D. 677; *Macleod v. Heritors of Morvern*, 16 Feb. 1870, 8 Macph. 528; and *Sibbald's Trs. v. Greig*, 13 Jan. 1871, 9 Macph. 399.

(d) See Chapter XI., p. 146.

(e) “In such cases where it may be necessary or proper to employ a country agent in conducting a cause in the Court of Session, reasonable charges may be allowed for his trouble, correspondence and agency, according to the rules and practice that have hitherto prevailed and been sanctioned by the Court: Provided always that double charges shall not be thereby incurred for doing the same business; *ex. gr.* if a charge for a memorial to counsel, at any particular stage of a cause, is allowed to the

is very rigorously enforced in taxations between party and party,^(g) in England as well as Scotland.^(h) It is also applicable to taxations between agent and client,⁽ⁱ⁾ unless it can be shown that the client sanctioned the double agency in the knowledge that, even in the event of his being completely successful, he could not recover from the opposite party the extra expense thereby occasioned.

11. The distinction of taxation as between party and

Distinction of taxation as between party and party, and as between agent and client.

agent in this Court, a charge for a memorial to instruct the agent shall not also be allowed in the account of the country agent ; or if a charge for a memorial is allowed in the country agent's account, a similar charge shall not at the same time be allowed to the agent in this Court, but only a reasonable charge for perusing, considering, and laying the same before counsel."—A. S., 19 Dec. 1835. Similarly, a country solicitor with an office in town, conducting personally the business which would have been ordinarily transacted by a town agent, is not entitled to charge for letters passing between the two offices; *In re Harle*, 12 Nov. 1868, 19 Law Times, N. S., 305.

(g) The evidence given by the present Auditor of the Court of Session, when examined by the Law Courts Commissioners, contains the following passage :—"I may state generally, with reference to the country agent, that I disallow everything in the shape of double agency ; but I think there is a little misapprehension in the country about what is disallowed. Wherever the country agent does work which is necessary for the cause, and which is not done in some other form by the Edinburgh agent, he is allowed it ; but where there is communication through the country agent to the party, that is disallowed. I find this very often in a country agent's account : 'Received letter from Mr A. B., with copy of the Lord Ordinary's interlocutor ; making copy thereof ; writing you [that is, the client] therewith.' Now, I go on the footing that the letter of the Edinburgh agent to the country agent is substantially the communication to the client, and that that is not to be sent on by him with a separate 4s. 4d. But where the country agent does work necessary for the cause, and which is not charged in some other shape by the Edinburgh agent, I allow it."

(h) Where, on the trial of a cause in London, the country as well as the London attorney attends, the rule that the costs of the attendance of the country attorney will not be allowed on taxation is not inflexible ; but the taxing master is entitled to decide whether under all the circumstances of the case such attendance was necessary ; *Bell v. Aitken*, 8 May 1868, 3 Law Reports, Common Pleas, 320. It is however only in extreme cases that the attendance of the country agent is allowed : see Evidence taken by the Law Courts Commission, § 12,211.

(i) A.S. 19 Dec. 1835, *infra* (l).

party, and as between agent and client, has long been known in England, and has been acted upon in Scotland ever since the appointment of the auditor of the Court of Session.^(k) In taxing accounts as between party and party, no expenses are allowed beyond those absolutely necessary for conducting litigation in a proper manner, and with due regard to economy,^(l) while in taxations as between agent and client, generally speaking no expenses are disallowed, except such as have been needlessly and improperly incurred by the agent without the authority of his client.^(m) Sometimes, however, the Court direct the expenses of a successful litigant to be taxed as between agent and client;⁽ⁿ⁾ and when litigants agree that the expenses of both sides shall be paid out of the estate or fund in dispute, and the

(k) A.S., 6 Feb. 1806; *Allan v. McLeish*, 10 July 1819, 2 Mur. 165.

(l) "All the foregoing regulations shall be held as applicable to the taxation of accounts, as well between party and party as between agent and client; but in order that the expense of litigation may be kept within proper and reasonable bounds, it is hereby declared that, in taxing accounts between *party and party*, only such expenses shall be allowed as are absolutely necessary for conducting it in a proper manner, with due regard to economy: *Ex. gr.* if a party shall think proper to employ an unnecessary number of counsel, or to pay higher fees than are warranted by the ordinary practice, the *extra* expense thereby occasioned shall not be allowed against the losing party.

"And it is hereby declared that, notwithstanding a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular branch or part of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings;" A.S., 19 Dec. 1835.

(m) *Reid v. Montgomerie and Fleming*, 14 Jan. 1847, 9 D. 487; *Neilson v. Livingstone*, 20 Jan. 1859, 21 D. 282.

(n) Where an unsuccessful party to a suit is ordered to pay costs, it is not the practice of the English courts to direct such costs to be taxed as between solicitor and client, except where a fiduciary relation exists between the parties, or where there is something in the nature of scandal, as where gross charges of fraud have been made but not sustained; but where the successful party is a trustee, his costs may be directed to be taxed as between solicitor and client, whether there is or is not any fund out of which they may be paid; *Turner v. Collins*, 22 July 1871, 12 Law Reports, Equity, 438.

Court find accordingly, the account of the losing party falls to be taxed as between agent and client.(o) When, however, an unsuccessful party has been found liable in expenses, subject to taxation as between agent and client, the taxation is not necessarily conducted on the same principle as when the client has to pay them, and the auditor is entitled to strike off needless and excessive charges which might be allowed between agent and client.(p) In taxing an account incurred by a wife in a consistorial action between herself and her husband, the principle adopted is not as between party and party, nor as between agent and client, but an intermediate principle, by which the wife is allowed all expenses properly incurred in conducting the action, but not unreasonable disbursements authorised by her.(q) The principle involved in both the instances just mentioned is that the party liable in payment of the account has not had the conduct of the business with the expense of which he is charged, and therefore very little latitude is allowed beyond the rule adopted in taxations as between party and party.

2. The auditors of the various courts have necessarily a considerable discretionary power, with which the judges are very reluctant to interfere. In a somewhat special case the Court of Session sustained the report of the auditor, where he had increased certain of the charges, which had been stated below those authorised by the regulations.(r) But this decision can scarcely be regarded as settling that it is the duty of the auditor to add to the charges stated in an account, so as to make them conformable to the tables of fees, especially as the taxing masters of English courts have no

Powers of
auditors.

(o) *Henderson's Trs. v. Tulloch*, 4 Feb. 1834, 12 S. 399.

(p) *Walker v. Waterlow*, 20 March 1869, 7 Macph. 751.

(q) *Taylor v. Taylor*, 17 Nov. 1831, 10 S. 18; *King v. Patrick*, 26 Feb. 1845, 7 D. 536; *Hinshaw v. Hinshaw*, 12 Dec. 1846, 9 D. 251; *Campbell v. Campbell*, 15 May 1861, 23 D. 873; *Fraser on Personal and Domestic Relations*, vol. i., p. 705. See also *Souter*, 22 Nov. 1843, 16 Jur. 86; and *M'Farlane v. M'Farlane*, 3 Mar. 1847, 9 D. 793.

(r) *Reeve v. Dykes*, 21 May 1829, 7 S. 732. This case is more fully reported in 1 Jur. 183.

such power.^(s) It is, however, understood that the auditor of the Court of Session not unfrequently exercises a discretionary power in this matter. But, in any case, when a law agent libels on an account amounting to a particular sum, it would be contrary to all practice to allow the charges to be increased so as to bring out a sum larger than that concluded for.^(t) It has been held in England (and the decision is in conformity with the practice in Scotland) that a taxing master is entitled to disallow items incurred while an attorney has been uncertificated,^(u) and also to give effect to the rule which prohibits trustees from making profit out of the trust-estate.^(x)

Proceedings
after tax-
ation.

13. When the taxation is finished, the auditor writes a short report at the end of the account, specifying the taxed amount. If the audit has taken place under a remit from the Court, the process is then enrolled for the approval of the auditor's report and a decerniture for the taxed amount. If either party objects to the manner in which the account has been taxed, he must lodge a note of his objections, specifically stated; and these objections are disposed of by the Court, generally after a *viva voce* discussion.^(y) The Court will not usually interfere with the auditor's taxation, except on questions of principle.

Expenses of
legal pro-
ceedings
against
client, and
of taxation
of accounts.

14. When a law agent is obliged to have recourse to legal

^(s) *In re Catlin*, 5 May 1854, 18 Beavan, 519. See also *Eyre v. Shelly*, 29 April 1841, 10 Law Journal, Exchequer, 395.

^(t) In *Shiress v. Philip* (16 July 1857, 2 Law Chronicle, 50) it was held by Sheriff Monteith, confirming the interlocutor of his substitute, that it was not competent for the auditor to increase the charges in an account, or to insert charges which had not been filled up.

^(u) *Young v. Dowlman*, 1829, 3 Younge & Jervis, 24; *Punter v. Grantley*, 11 June 1841, 3 Manning & Granger, 295; *Angell*, 1848, 6 Dowling & Lowndes, 144; *Fullalove v. Parker*, 26 May 1862, 31 Law Journal, Common Pleas, 239.

^(x) *Craddock v. Piper*, 22 Jan. 1850, 1 Hall & Twell, 617, and 1 Macnaughten & Gordon, 664; *Lyon v. Baker*, 30 June 1852, 5 De Gex & Smale, 622.

^(y) *Shand's Practice of the Court of Session*, p. 1021; *M'Glashan's Sheriff-Court Practice*, 4th edit p. 333; *Dove Wilson's Sheriff-Court Practice*, p. 118.

proceedings for the recovery of his account, he will generally be found entitled to his expenses, even although a large proportion may have been taxed off.^(z) But it is otherwise if the client has offered to settle the account when audited.^(a) There is no absolute rule as to the expense of taxation; but it is the practice of the auditor in taxing accounts as between agent and client to allow to the agent the expense of taxation, unless one-fifth or more has been taxed off, in consequence of excessive or improper charges.^(b) When objections to the auditor's report are repelled, the expense of the discussion is laid on the objector;^(c) but not necessarily so, where the auditor has reported the objections for the determination of the Court.^(d)

(z) *M'Aulay v. Adam*, 7 May 1835, 1 S. & M'L. 665; *D. of Queensberry's Exrs. v. Tait*, 3 March 1827, 5 S. 521 (N. E. 490); *Macdonald v. Macdonald*, 22 Feb. 1856, 18 D. 630. See also Chapter XIII., on Summary Application for Taxation, &c., p. 181.

(a) *Clyne v. Spence*, 8 Dec. 1827, 6 S. 221.

(b) *Meiklejohn v. Moncreiff*, 11 Dec. 1850, 13 D. 303. See also *Hogg v. Balfour*, 11 Feb. 1835, 13 S. 451; and *Cameron v. Chapman*, 18 Nov. 1835, 14 S. 24. In England the rule is fixed by statute that, unless special directions as to the costs of taxation have been given by the Court, the taxation of one-sixth off a bill of costs subjects an attorney or solicitor to the costs, and that if less than a sixth be taxed off, the costs of taxation devolve on the client, the courts having no discretion in the matter, however small the excess may be; 6 and 7 Vict. c. 73, § 37; *Pulling's Law of Attorneys*, 5th ed., p. 363.

(c) A.S. 6 Feb. 1806; *Shand's Practice*, p. 1032.

(d) *Moyes v. Cook*, 10 July 1829, 1 Deas & Anderson, 289.

CHAPTER XIII.

SUMMARY APPLICATION FOR TAXATION OF
ACCOUNT AND DECREE AGAINST CLIENT.

A.S. 6 Feb.
1806.

1. The same Act of Sederunt that established the office of auditor of the Court of Session introduced a summary method, still in force, by which law agents may obtain decree against their clients for the taxed amount of accounts incurred in conducting proceedings in the Court of Session. The following are the terms of the Act of Sederunt relating to this subject:—"And for the purpose of preventing abuses of the foregoing regulations, and in order to provide an easy method by which the accounts of practitioners as between agent and client in this Court may be checked and liquidated, the Lords do further ordain that it shall be competent either to the client or to the agent to make a summary application to the Court, or to the Lord Ordinary before whom the case may depend or has formerly depended, to get the account claimed by the agent remitted to the auditor of the Court, in order to be examined and taxed according to these regulations; which remit shall, on the application having been served upon the opposite party and produced in Court with a written intimation, be forthwith granted; (a) and the auditor shall thereafter inquire and report upon the said account to the Court or the Lord Ordinary; and the parties shall have it in their power to state objections to the report,

(a) If the account has been already taxed, a remit to the auditor may be dispensed with, on the party liable in payment lodging a minute to that effect; *Walker v. Jones*, 12 Feb. 1867, 5 Macph. 358.

all in manner above mentioned.(b) And the sum so to be ascertained as the amount shall alone form a charge against the client. And a precept or decree on a charge of fifteen days may issue accordingly.(c) And it is hereby enacted that these proceedings may take place either during the dependence of a process, or after it is out of Court by an extracted decree.”(d)

2. An application under this Act of Sederunt is competent when the account incurred relates to proceedings before any branch of the Court of Session.(e) But other charges, such, for example, as factor fees, can be recovered only by means of an ordinary action.(g)

To what charges the A.S. applies.

3. The application ought to be served upon the party, service on his known agent not being sufficient, unless the latter has expressly dispensed with the citation of his client.(h) But under the Court of Session Act of 1868 no party appearing in any proceeding is entitled to state any objection to the regularity of the execution or service as against himself of the writ whereby he is convened.(i) When all the parties liable in payment of the account have not been called in the original petition, those who have been omitted may be called in a supplementary application.(k)

Service required.

4. The Act of Sederunt proceeds on the assumption that a party is liable in payment of an account, the amount of

Summary application incompetent where liability is denied.

(b) It is now competent to reclaim against an interlocutor of the Lord Ordinary disposing of objections to the auditor's report, the regulation of the Act of Sederunt having been superseded by the Judicature Act; *Cleugh v. Independent West Middlesex Insurance Co.*, 11 March 1841, 3 D. 884.

(c) The *inducitæ* of charges upon decrees against parties within Scotland still remain fifteen days; but the *inducitæ* upon edictal charges on decrees are now reduced to fourteen days; 31 and 32 Vict. c. 100, § 14; *Scott & Brand on the Court of Session Act of 1868*, p. 15.

(d) A. S. 6 Feb. 1806. For form of application, see Appendix.

(e) *Jameson v. Wight*, 10 Feb. 1829, 7 S. 632.

(g) *Howison v. Stewart*, 9 June 1832, 10 S. 630; *Baxter*, 5 Feb. 1828, 6 S. 487.

(h) *Cullen v. Campbell*, 8 Dec. 1829, 8 S. 197.

(i) 31 and 32 Vict. c. 100, § 21.

(k) *Gowan*, 19 Feb. 1835, 13 S. 491.

which alone is disputed; and accordingly, if employment is denied, the petition will in ordinary circumstances be dismissed, reserving to the agent to constitute the debt by an ordinary action.^(l) The denial of employment is, however, unavailing, if the agent can instantly prove that he was employed by producing a written mandate,^(m) or if liability is admitted by the client.⁽ⁿ⁾ Prior to the existing Bankruptcy Act,^(o) when creditors ranked in a sequestration were held liable along with the trustee in payment of the account of the agent employed by him, a summary application against the creditors was held in several cases to be competent, although they disputed their liability.^(p) In these cases, however, the plea to which the Court seem to have given effect was that, the employment of the agent by the trustee being admitted, and the ranking of the creditors appearing from the sederunt book, which was part of the process, the liability of the creditors did really appear *ex facie* of the process as necessarily arising from the fact of their being ranked.^(q) The question was raised in one case whether, if the client admits the employment of the agent, it is competent to entertain the objection that the agent's claim is barred by his mismanagement of the cause; but the Court repelled the objection, without deciding the question of competency.^(r)

Inhibition
competent
on depend-
ence.

5. Inhibition is competent on the dependence of an application under the Act of Sederunt.^(s)

^(l) Thorburn and Stewart v. Graham, 17 June 1825, 4 S. 101 (N. E. 103); Adam v. Aitken, 11 Dec. 1832, 11 S. 196.

^(m) Fisher v. Robertson, 25 June 1828, 6 S. 1017.

⁽ⁿ⁾ Malcolm v. Niven, 5 July 1825, 4 S. 138 (N. E. 140).

^(o) 19 and 20 Vict. c. 79. The 57th section provides that the creditors shall not be liable to the agent employed by the trustee. See chapter XI. p. 150.

^(p) Howden's Tr. v. Dunlop & Co., 10 Feb. 1835, 13 S. 445; Gowan, 19 Feb. 1835, 13 S. 491; Martin v. A. B., 29 May 1835, 13 S. 838; Brodie v. McFarlane's Crs., 19 Nov. 1845, 8 D. 32.

^(q) Howden's Tr. v. Dunlop & Co., *supra*.

^(r) Burness v. Morris, 7 July 1849, 11 D. 1258. See also p. 132, *et seq.*

^(s) Gibson v. Dods, 15 Jan. 1829, 7 S. 254.

6. It was formerly held that where no unnecessary opposition was made by the client, the law agent was not entitled to the expenses of the application, other than outlays. (t) But it is now quite settled that, in the absence of special circumstances, such as the account being grossly overcharged, the agent is entitled to decree for the expenses of the application and procedure following thereon, including the expense of appearance at moving the approval of the auditor's report. (u) In applications under the Act of Sederunt, as well as in extrajudicial audits of accounts as between agent and client, it is the practice of the auditor to allow the agent the expense of the taxation of his account, unless one-fifth or more has been taxed off in consequence of improper or excessive charges. (x)

Agent entitled to expenses of application.

7. The Act of Sederunt above quoted refers only to accounts incurred in conducting proceedings in the Court of Session; but a similar remedy is competent to practitioners in the sheriff-courts, under the Act of Sederunt of 10th July 1839, which provides that—"§ 110. In order to provide an easy method by which the accounts of practitioners, as between agent and client, may be checked and liquidated, it shall be competent either to the client or to the agent to present a summary application to the sheriff before whom any cause may depend, or may have depended, to get the account claimed by the agent audited and taxed: such application shall be served on the party, and on its being produced in Court, with a service of intimation of at least seven days, it shall be forthwith granted; and the said account shall thereupon be audited and taxed, and the parties shall have it in their power to state objections to the report, all in manner before provided. § 111. The sum so ascertained as the amount of the account shall form the only charge against

Applications in the sheriff-courts.

(t) M'Donnell, 8 Feb. 1823, 2 S. 196 (N. E. 173); Brown, 24 Nov. 1831, 10 S. 45.

(u) Miller, 10 March 1832, 10 S. 479; Pattison v. Phaup, 1 June 1832, 10 S. 606; Martin v. A. B., 29 May 1835, 13 S. 838; Roy v. Paton, 9 July 1835, 13 S. 838; Duncan v. Poynter, 30 Nov. 1839, 2 D. 164; Sprott v. Clark, 12 July 1854, 16 D. 1043.

(x) Meiklejohn v. Moncreiff, 11 Dec. 1850, 13 D. 303. See also *ante*, p. 177.

the client, and a precept or decree, on a charge of fifteen days, may issue therefor; provided always that the judgment of the sheriff shall be liable to review in common form. § 112. The said application may be presented either during the dependence of a process, or after it is out of Court by an extracted decree; but it shall not be competent where liability for payment of the account is disputed by the client, in which case the agent shall be bound to proceed by an ordinary action."

The application may be made to the sheriff before whom the action depends or has depended, even although the client does not reside within his jurisdiction.(y)

(y) M'Glashan's Sheriff-Court Practice, 4th edition, p. 334.

CHAPTER XIV.

HYPOTHEC OR PREFERENCE OF LAW AGENTS
ON COSTS.

1. A law agent employed to conduct litigation is entitled to a hypothec or preference on the costs to be recovered from his client's opponent. (a) This privilege was probably derived from the law of France; (b) and it appears to have been recognised by our courts towards the end of last century. (c) "It seems to proceed on the idea of a tacit agreement or understanding between the agent and the client, founded on equity, that the client shall not receive payment of the costs awarded against the opposite party without paying his agent. And it is recommended by the great motive of public justice and expediency, that the doors of a court of justice shall not be barred against a poor man on account of his inability to advance to his agent the necessary expense of the proceedings." (d) "An agent's right to the expenses in a process, which he has made good by his labour and disbursements, is very strong, and founded on reasons of sound policy. The law will not readily deprive him of it." (e)

General
nature of
hypothec
or prefer-
ence on
costs.

(a) Beveridge's Forms of Process, p. 619; Shand's Practice, p. 1033; Mc'Glashan's Sheriff-Court Practice, 4th ed. p. 336; Dove Wilson's Sheriff-Court Practice, p. 118, 2 Bell's Com. 35; Bell's Prin. § 1388.

(b) See Pothier, *Traité du Contrat de Mandat*, § 135 *et seq.*

(c) See unreported cases referred to in *Smyth v. Gemmell*, 9 July 1802, M. 6257, and 13 F.C. 114; and *Hamilton v. Bryson*, 17 June 1813, 17 F.C. 378.

(d) 2 Bell's Com. 35. See also Pothier, *supra*, § 137.

(e) *Per* Lord Moncreiff in *Munro v. Bothwell*, 16 Sep. 1846, Arkley, 118.

Decree for
expenses in
agent's own
name.

2. The most ordinary result of this right of hypothec is that, when expenses have been found due to a litigant, his agent is entitled to have decree therefor issued in his own name. In the Court of Session the practice is for the Court to find the client entitled to expenses, and to remit his agent's account to the auditor for taxation; and on the subsequent motion for the approval of the auditor's report, counsel request the Court to decern in name of the agent-disburser. In the case of procurators in the sheriff-courts, it is expressly provided by Act of Sederunt that "in all cases where a decree is given for expenses, the sheriff, if he see cause, may, upon the application of the procurator who conducted the suit, allow the decree for expenses to go out and be extracted in the name of such procurator."*(g)* In the ordinary case a procurator has only to obtain a minute by the opposite party appended to the auditor's report, consenting to decree in the procurator's own name; but if such consent is refused, he must move on the roll for decree in his own name.*(h)* When a party who has been found entitled to expenses dies before his agent's account has been taxed, his representatives must be sisted as parties to the process, before the agent can obtain decree in his own name.*(i)* But the circumstance that the client has withdrawn his authority from his agent, or has gone abroad without sisting a mandatory, does not bar the agent from getting decree for his expenses.*(k)* An agent who has ceased to act is still entitled, when expenses are finally awarded to his client, to decree in his own name for the amount disbursed by him and still unpaid.*(l)* Although the privilege is properly restricted to professional men, yet if the agent-disburser dies or becomes bankrupt before decree is obtained, decree may

(g) A. S. 10 July 1839, § 106.

(h) M'Glashan's Sheriff-Court Practice, 4th ed. p. 336.

(i) Baillie v. Campbell, 25 Jan. 1872, 10 Macph. 414.

(k) Taafe v. Taafe, 22 Feb. 1822, 1 S. 341 (N. E. 319); Henderson v. Gilfillan's Agent, 20 Feb. 1834, 12 S. 468. See also Ferguson, Halliboy & Co. v. Richardson, 8 July 1826, 4 S. 814 (N. E. 821).

(l) Hunter v. Pearson, 20 Feb. 1835, 13 S. 495.

be allowed to go out in the name of his representatives,(*m*) or of the trustee on his sequestrated estate.(*n*) It was held in an early case that the privilege did not extend to a friend of the client advancing money to meet the expenses of process.(*o*) But a cautioner in a suspension, being very much in the position of a party to the process, is entitled to appear and obtain decree in his own name for the amount of expenses advanced by him.(*p*)

3. There is no case in which a client has objected to decree going out in name of his agent; and probably the only objection that a client will be allowed to state is, that he himself has disbursed the expenses for which his agent craves decree.(*q*) An agent-disburser has a *jus quæsitum* in the expenses, apparently entitling him to prevent his client from taking decree in his own name.(*r*) A party cannot defeat the right of his agent, by entering into any arrangement with his opponent, whereby he discharges expenses to which he has been found entitled.(*s*)

4. Objections to an agent's taking decree for expenses, have frequently been stated by the opposite party; but the only objections that have hitherto been sustained, are that the agent is uncertificated,(*t*) that he has not actually disbursed the expenses, and that the expenses found due are

Client not
entitled to
object.

Objections
competent
to opposite
party.

(*m*) *Anderson v. Clark*, 6 March 1834, 12 S. 526.

(*n*) *Hunter v. Pearson*, 20 Feb. 1835, 13 S. 495.

(*o*) *Campbell v. Montgomerie*, referred to in *Smyth v. Gemmell*, 9 July 102, M. 6257, and 13 F.C. 114. In one case the Court found a trustee who had raised an action of declarator as to the management of the trust, and *his assignees as in his right*, entitled to expenses out of the trust-funds; but the assignees were the agents-disbursers; *Shepherd v. Hutton's Trs.*, 24 Feb. 1855, 17 D. 516.

(*p*) *Henderson v. Young*, 5 Dec. 1828, 7 S. 142.

(*q*) See 2 Bell's Com., 36.

(*r*) *Per* Lord Bannatyne in *Hamilton v. Bryson*, 17 June 1813, 17 F.C. 378; and Lord Mackenzie in *Miller v. Geils*, 22 June 1848, 10 D. 1384.

(*s*) *Barr v. Wotherspoon*, 12 Dec. 1850, 13 D. 305; and *post*, p. 196.

(*t*) *Campbell & Robertson v. Strachan*, 29 June 1826, 4 S. 772; and *Ewing v. Wallace*, 3 Feb. 1831, 9 S. 385, and 13 Aug. 1833, 6 W. S. 222. See also *ante*, p. 54.

compensated by a counter award of expenses.(u) It is not a good objection that the client is perfectly solvent and able to pay his agent;(x) or that, being himself a practitioner before the court, he has taken the chief management of the process, his agent having appeared as such from the commencement.(y) Even a delay of two years has been held not to bar an agent from taking decree in his own name.(z)

Decree allowed only for expenses actually disbursed.

5. An agent who has not actually disbursed the expenses of process is not entitled to decree therefor. In an old case decree was allowed to go out in name of an agent, although the expenses had been previously paid to him by the mother of his client.(a) But no objection seems to have been raised at the time; and in a subsequent case it was held that the privilege having been introduced for the agent's own individual benefit, and not for that of any third party, an agent is entitled to decree in his own name only for so much of the expenses as may not have been paid to him by his client or his client's friends.(b) When a law agent not only conducts a suit, but acts as factor for a client, and takes credit in his factorial accounts for the expenses of litigation, the mere circumstance that the balance has at one time been against him, does not bar him from getting decree in his own name, provided a balance not less than the amount of the expenses is ultimately in his favour when the expenses are decerned for.(c) When an agent supersedes another and pays his account, he is entitled to decree in his own

(u) See *infra*, sections 5 and 7.

(x) *Russel v. Greig and Peddie*, 28 Jan. 1826, 4 S. 403 (N. E. 406); and *Bell's Prin.*, § 1389.

(y) *D. of Queensberry's Exrs. v. Tait*, 3 Mar. 1827, 5 S. 521 (N. E. 490).

(z) *Barr v. Wotherspoon*, 12 Dec. 1850, 13 D. 305.

(a) *Campbell v. Montgomerie*, referred to in *Smyth v. Gemmell*, 9 July 1802, M. 6257, and 13 F.C. 114.

(b) *Rennie v. Playfair and Aitken*, 8 June 1811, 16 F.C. 274; 2 *Bell's Com.* 38. See also *Pothier, Traité du Contrat de Mandat*, § 135. By the law of France an attorney is entitled to decree for expenses on stating that he has made the greater part of the disbursements; *Code de Procédure Civile*, § 133.

(c) *Hunter v. Pearson*, 20 Feb. 1835, 13 S. 495.

name, to cover both his own and the former agent's account.(d) But in order to be entitled to decree for the former agent's account, he must have actually paid it. In an unreported case, a party who had acted as his own agent during the early proceedings, in a process in which he was ultimately found entitled to expenses, attempted to get decree therefor in name of another agent who had conducted the later proceedings in the cause. But an arresting creditor, who had attached these expenses appeared, and stated that the agent had not disbursed the whole expenses, and craved that decree in the agent's name should be allowed to go out only for those actually disbursed, thus leaving the balance open to the arrestment. The Court remitted to the auditor to report what part of the account had been disbursed while the party acted as his own agent, and what by the agent for him in the more recent proceedings, and thereafter allowed decree to go out in the agent's name only for the expenses of the proceedings which he had conducted, and preferred the arresting creditor, even without the necessity of repeating a summons of multiplepounding (there being no other diligence used against the party), to the remainder of the account of expenses, as disbursed by the party himself.(e)

6. The opposite party cannot object to decree going out in the agent's name on the ground that he will be thereby deprived of a claim of compensation.(g) Even when an interlocutor awarding expenses to one party contains a decerniture for a principal sum in favour of the opposite party, the agent of the former is entitled to decree in his own name for the expenses, compensation between the principal sum and the expenses not being allowed.(h) The

Compensation cannot be pleaded between expenses and a principal sum.

(d) 2 Bell's Com. 39 ; Bell's Prin., § 1394.

(e) Beveridge's Forms of Process, p. 620.

(g) Smyth v. Gemmell, 9 July 1802, M. 6257, and 13 F.C. 114; Gordon v. Wyllie, *ib.*; Russel v. Greig and Peddie, 28 Jan. 1826, 4 S. 403 (N. E. 406); Miller v. Geils, 22 June 1848, 10 D. 1384; 2 Bell's Com. 36; Bell's Prin. § 1390.

(h) Munro v. Bothwell, 16 Sept. 1846, Arkley 118. A similar rule seems to be now adopted by the English courts; Stokes on Liens of Attorneys, p. 108; Pulling's Law of Attorneys, 5th edition, p. 383.

principle of the decisions on this subject seems to be that the agent's right is good against both parties, his opponent as well as his client; (i) though there is no claim of debt against the opposite party till decree is actually obtained. (k) In one case in which the expenses of certain processes had been submitted to arbitration, and one of the parties had requested the arbiters, if they awarded expenses, to do so in favour of his agent, the arbiters found expenses due to the party, but stated them as part of an account and decerned for a balance against him, and in these circumstances it was held that his agent, founding on the decree-arbitral, could not enforce payment of the expenses in question from the opposite party. (l)

Compensation allowed between counter awards of expenses.

7. The reasons which prevent compensation being allowed between expenses due to an agent and a principal sum due by his client, do not apply to the case of counter awards of expenses. (m) In such a case, each agent is not entitled to decree for the amount of his account; but the smaller account is deducted from the larger, and decree is allowed to go out only for the balance. (n) It is not necessary, in order to found a plea of compensation of expenses, that the two awards be contained in the same interlocutor: expenses awarded at different stages of a process may compensate each other in whole or in part. (o) Compensation of expenses will be allowed even when one of the parties is on the poor's roll. (p) The question has been raised, but not decided, whether when a client has assigned to his agent-disburser a decree for expenses in a submission, the agent

(i) *Per* Lord Fullerton in *Miller v. Geils*, *supra* (g).

(k) *Crawford v. Gemmells*, 23 Dec. 1864, 3 Macph. 306.

(l) *Mackenzie v. Robertson*, 24 June 1831, 9 S. 798.

(m) See *Pothier, Traité du Contrat de Mandat*, § 136; and *Stokes on Liens of Attorneys*, p. 110.

(n) *Stothart v. Johnstone's Trs.*, 23 May 1823, 2 Mur. 549; *Warburton v. Hamilton*, 30 May 1826, 4 S. 631 (N. E. 639); *Halliday v. Halliday* 22 Jan. 1828, 6 S. 406.

(o) *Graham v. McArthur*, 28 Nov. 1826, 5 S. 49 (N. E. 46); *Gordon v. Davidson*, 13 June 1865, 3 Macph. 938.

(p) *Gordon v. Davidson supra* (o).

may be met with a plea of compensation founded on a claim of expenses against his client in another process with the same party. (q)

8. It seems doubtful whether an agent who takes decree for expenses in his own name thereby makes himself a party to the action, and may be so cited in any appeal subsequently taken. In one case, decree having been obtained against the respondent in an advocacy, and expenses decerned for in name of the advocate's agents, the respondent brought processes of reduction and suspension to have the decree and charge thereon set aside, and called the agents as parties thereto. The agents lodged a minute, stating that the decree for expenses had been taken in their names merely to facilitate the payment of their account, and that their client having recently paid the amount, they had no farther interest in the process. The Court, in respect of this minute, allowed the agents to withdraw as parties, as at the date when the minute was lodged, reserving to all parties all questions of expenses *hinc inde*. (r) The same course was followed in a subsequent case, in which both the pursuers and their agents were called as respondents in an advocacy of a sheriff-court process; but the Court did not decide whether the agents had been properly called as parties. (s) When decree has been allowed by the Court of Session to go out in name of an agent, and the judgment is reversed on appeal to the House of Lords, the appellant is entitled to obtain repayment of the expenses from the agent. (t) But under a petition for interim execution pending appeal, the Court repelled the objection that caution should have been found by agents who had taken decree for the expenses, instead of the party in whose favour the expenses had been awarded. (u) When the interlocutor decerning for payment

Effect of
agent taking
decree in his
own name.

(q) *Pollock v. Scott*, 12 Feb. 1831, 9 S. 432. See also *Craig v. Craig*, 1 June 1852, 14 D. 829.

(r) *Dutch v. Greig & Morton*, 26 June 1835, 13 S. 986.

(s) *M'Lachlan v. Baxter & Alexander*, 10 June 1848, 10 D. 1265.

(t) *Cormack v. Tod*, 3 June 1845, 7 D. 812. On the question of interest on expenses ordered to be repaid, see *Ewart v. Latta*, 1 July 1865, 3 Macph. 1167; and *Fleeming v. Howden*, 6 Nov. 1868, 7 Macph. 79.

(u) *Cleland v. Clason & Clark*, 15 Feb. 1849, 11 D. 601.

of expenses in name of the agent is not included among those appealed against, there is nothing to prevent the agent from enforcing the decree, and therefore a petition for execution pending appeal is incompetent *quoad* the expenses.(x) The somewhat ambiguous position of an agent who has taken decree in his own name has in several cases led to questions being raised in regard to diligence on the decree. In one case an agent who had executed diligence on a decree obtained in a competent court, *inter alia* decerning in his name for expenses, was held not liable in damages to the opposite party, although steps had been taken at the time of using the diligence to bring the decree under reduction, and it was ultimately found to be erroneous.(y) In another case a suspension of a charge for payment of expenses, which had been given in name both of a party and his agent was presented, on the ground that the expenses having been decerned for in name of the agent, and the decree having been implemented *quoad ultra*, the agent alone ought to have charged; but the objection was repelled.(z) It has been held that when the agent of a landlord takes decree in his own name for the expenses of a sequestration for rent, the decree and the registered bond of caution granted by the tenant's cautioner are sufficient warrant for letters of horning in the agent's own name against the cautioner.(a) When a party against whom expenses have been awarded consigns the amount, in order to obtain the passing of a note of suspension or to procure liberation, he cannot arrest the sum consigned, on the dependence of an action against the charger.(b) It is doubtful whether a party who has inhibited, in security of his expenses, is prevented from pursuing in his own name an action of reduction of a deed granted *spreta inhibitione*, on account of the expenses having been decerned for in name

(x) *Forster v. Forster*, 16 June 1871, 9 Macph. 829.

(y) *Aitken v. Finlay*, 25 Feb. 1837, 15 S. 683.

(z) *Campbell v. Cassils*, 24 Nov. 1849, 12 D. 177.

(a) *Clark v. Duncan*, 3 Dec. 1833, 12 S. 158.

(b) *Ellis v. Mackersie*, 12 May 1831, 9 S. 585.

of his agent: the difficulty is, however, obviated by the action being raised with consent of the agent.(c)

9. Although an agent-disburser has not actually obtained decree for expenses in his own name, he is still in certain circumstances entitled to a preference. If any competition arises before decree is extracted, he is preferred, on the principle that he can step in and take decree in his own name;(d) and even after decree has gone out in name of the client, it is sufficient for the agent to intimate to the party against whom the expenses have been awarded that they are to be paid to him and not to his client, provided the intimation be made before any *jus quæsitum* has accrued either to the debtor or to a third party.(e) Thus, a charge for payment of expenses decerned for in name of a client cannot be suspended on the ground of compensation, if notice has been given before the charge that the expenses are to be paid to

Preference
for expenses
when agent
has not
taken de-
cree there-
for.

(c) *Smith v. Little*, 5 March 1836, 14 S. 654.

(d) *Per* Lord Cringletie in *Stephen v. Smith*, 1 June 1830, 8 S. 847. See also *Mill v. Wright*, 12 Jan. 1802, 2 Bell's Com. 37, n. 3; and *Swan v. Jeffrey*, 15 Jan. 1829, 7 S. 268.

(e) 2 Bell's Com. 37; *Fleeming v. Love*, 25 June 1839, 1 D. 1097. There is no prescribed mode in which the notice must be given, but it should be formal; Bell's Prin. § 1393. By the law of England similar effect seems to be given to notice by an attorney to the opposite party that his costs are unpaid, and that he looks to the proceeds of the action for payment of his bill; Lush's Practice, 3d ed., i. 333; Stokes on Liens of Attorneys, 115. Thus, it was held in *Read v. Dupper* (13 June 1795, 6 Durnford & East, 361) that the defendant's attorney, having paid to the plaintiff the debt and costs recovered, notwithstanding notice from the plaintiff's attorney not to do so till his bill should be paid, was bound to pay over again to the latter the amount of his costs. The same rule is applicable to a sum awarded by arbiters (*Ormerod v. Tate*, 13 May 1801, 1 East, 464), or agreed to be paid under a compromise; *Welsh v. Hole*, 6 Nov. 1779, 1 Douglas, 238; and *White v. Pearce*, 14 July 1848, 7 Hare, 276. But notwithstanding the dictum of Lord Mansfield in *Welsh v. Hole*, *supra*, quoted by Mr Bell in his Commentaries, ii. 36, n. 2, notice by an attorney does not make his right equivalent to an equitable assignment, or prevent the parties entering into a *bona fide* compromise or settlement of the action; *Brunslon v. Allard*, 9 June 1859, 28 Law Journal, Queen's Bench, 306; and *In re Sullivan v. Pearson*, *ex parte Morrison*, 24 Nov. 1868, 4 Law Reports, Queen's Bench, 153.

the agent-disburser ;(g) but it is otherwise if the suspension has been raised before any such notice has been given.(h) In one case, however, an agent who had given no notice was held entitled to appear in a suspension of a charge in name of his client, and to obtain decree for the expenses in his own name.(i) But it is to be observed that the suspension had been refused, and the question was between the law agent and the trustee on his client's sequestrated estate. The principle of the decision thus appears to have been that the fund having been brought into court, the trustee was as much trustee for the agent as for the other creditors of the client, their preference being preserved by the sequestration ;(k) and it has since been decided that an agent's right of preference on expenses awarded to his client, while still unpaid, cannot compete with an arrestment by one of the client's ordinary creditors, executed before notice by the agent to the opposite party.(l)

Expenses in
arbitrations.

10. Expenses found due in a submission appear to be in the same position, in regard to the hypothec of the agent-disburser, as those in a lawsuit ;(m) and even when the deed of submission does not specially empower the arbiter to pronounce decree for expenses, in name of the agent of the successful party, he may do so on the request of the party and his agent.(n) But an agent, founding on a decree arbitral, cannot enforce payment of expenses which the arbiters have allowed to be compensated by a counter claim.(o)

(g) *Mackenzie v. Ross*, 13 June 1823, 2 S. 401 (N. E. 356).

(h) *Fleeming v. Love*, *supra* (e); and Bell's Prin. § 1390.

(i) *M'Tavish v. Peddie*, 13 June 1826, 4 S. 704 (N. E. 710); and 23 Feb. 1828, 6 S. 593.

(k) *Per* Lord Justice-Clerk Boyle, in *Stephen v. Smith*, 1 June 1830, 8 S. 847.

(l) *Stephen v. Smith*, *supra* (k). See also *M'Ewen v. Doig*, 30 May 1828, 6 S. 889.

(m) Bell's Prin. § 1396; *Pollock v. Scott*, 12 Feb. 1831, 9 S. 432; *Stephen v. Smith*, 1 June 1830, 8 S. 847. See also Stokes on Liens of Attorneys, p. 117.

(n) Bell on Arbitration, p. 226; *Hood v. Baillie*, 13 Dec. 1832, 11 S. 207; *Henry v. Hepburn*, 29 Jan. 1835, 13 S. 361.

(o) *Mackenzie v. Robertson*, 24 June 1831, 9 S. 798.

11. The English courts have long recognised the right of the attorney or solicitor of a successful litigant to a preference or lien on personal property recovered or preserved through his instrumentality ;(*p*) and this privilege has been recently sanctioned by express legislative provision, and extended to property of every description.(*q*) The Court of Session, "in two cases, went the full length of the English doctrine, by sustaining an agent's claim of hypothec over the *fund decerned for* in the decree pronounced in his client's favour.(*r*) But, more lately, the doctrine carried to this extent, has been discountenanced ; and while, so far as they gave the agent a preference over the expenses unpaid to his client, former judgments have been approved of, the extension of this doctrine to a hypothec over the fund, has been entirely rejected.(*s*) The question at issue between the former and the latter judgments seems to be, Whether there is not, from the first employment of an agent, an implied assignation in equity of the fund to be recovered, to the extent of the expense employed in recovering it ? and whether this fund, as a *jus incorporale*, must not be taken by all creditors and assignees, subject to the same equitable burden which affects it as between the claimant and his agent ? There does not appear, however, to be any ground in law on which such assignation can be either presumed or made effectual ; and no hypothec of this sort is established by ancient precedent or immemorial custom, the sole grounds on which it can effectually rest, and accordingly the above judgment against the hypothec seems now to be held as settled law."(*t*) The opinion of Mr Bell here quoted has

No preference on fund recovered or preserved.

(*p*) Pulling's Law of Attorneys, 5th edition, p. 381 ; Stokes on Liens of Attorneys, p. 85 ; 2 Bell's Com. 35.

(*q*) 23 and 24 Vict. c. 127, § 28. See also *Baile v. Baile*, 17 Feb. 1871, 41 Law Journal, Chancery, 300.

(*r*) *Johnstone v. Creditors of York Buildings Company*, and *Clapper-ton v. MacLachlan*, 2 Bell's Com. 37, n. 4. See also *Smyth v. Gemmell*, 9 July 1802, M. 6257, and 13 F.C. 114.

(*s*) *Allison's Trs. v. Wyllie*, 29 Nov. 1808, 2 Bell's Com. 36, n. 6, and 38 n. 1 ; 15 F.C. 16 ; and *Hume*, 454.

(*t*) 2 Bell's Com. 37 ; *Cranston v. Stevenson*, 10 March 1809, *Hume*, 455 ; *Rennie v. Playfair & Aitken*, 8 June 1811, 16 F.C. 274.

been amply confirmed by cases decided since the publication of his Commentaries; and there is no longer the slightest doubt as to the law of Scotland on this subject.^(u) "An agent is not understood to rely for reimbursement on the subject which he defends or vindicates, but on the personal credit of his employer."^(x) It has accordingly been held that he cannot compete with creditors of his employer who have attached the fund,^(y) or with the trustee on his client's sequestrated estate.^(z) He has no preference on a fund consigned in bank, subject to the orders of the Court, unless consignment has been made in security of his expenses.^(a) But he is, of course, entitled to apply in payment of his accounts money belonging to his client in his own personal possession or custody, provided he does not hold it on a limited title, or for a specific and conditional purpose.^(b) When a sum of money has been received by an agent for a specific purpose, the balance must be returned, whatever claim he may have against his client.^(c) If an agent-disburser who has obtained decree for expenses happens to have in his hands a sum belonging to the party against whom the expenses have been awarded, he may retain the

(u) Cullen v. Smith, 20 Nov. 1845, 8 D. 77; and other cases *infra*.

(x) *Per* Lord Meadowbank, in Skinner v. Mags. of Haddington, 17 Feb. 1813, 17 F.C. 207.

(y) Allison's Trs. v. Wyllie, 29 Nov. 1808, 2 Bell's Com. 36 n. 6, and 38 n. 1; and Hume, 454; Cranston v. Stevenson, 10 March 1809, Hume, 455; Skinner v. Mags. of Haddington, *supra* (x).

(z) Cullen v. Smith, 20 Nov. 1845, 8 D. 77; Peddie v. Davidson, 17 July 1856, 18 D. 1306.

(a) Cullen v. Smith, and Peddie v. Davidson, *supra* (z).

(b) Cullen v. Smith, *supra* (z). In the case of *Wight's Trs. v. Allan* (12 Dec. 1840, 3 D. 243, and 16 F. 186), an agent for trustees was held to have a preference over trust-funds deposited in bank, for his business account and the expense of constituting it, as against the arresting creditors of a trustee, who had made advances to the trust. The deposit-receipt for the money was in the agent's hands, and it was questioned whether he had a lien over it. But the opinion received considerable support that, even if it had been in the hands of a third party, the agent would have been entitled to a preference for accounts incurred previous to the arrestments.

(c) Hendry v. Grant & Jameson, 27 May 1868, 5 Scot. Law Rep. 544.

amount; but, there being no debt or claim till the expenses have been found due, he cannot compete with a creditor who has arrested the sum during the progress of the litigation, even for the amount disbursed before the date of the arrestment.(d)

12. A partial exception to the general rule has been recognised in the case of an account incurred to a law agent for defending a client's right to an alimentary fund, such an account being regarded as an alimentary debt, and consequently preferable to ordinary debts; and an opinion has been expressed that an account for defending the life of a client in a criminal court would be entitled to a similar privilege. But the privilege does not extend to an account for defending the owner of an alimentary fund against an ordinary action for debt.(e)

Exception in the case of an alimentary fund.

13. The general rule of law in regard to the conduct of litigation is, that the parties are the true *domini litis*, and may therefore enter into any arrangement or compromise that they please.(f) As far as their own interests are concerned, there is no restriction on this right; and notwithstanding the prospective hypothec of their agents, they may in the ordinary case discharge the expenses to which they might have been found entitled.(g) And when a creditor takes legal proceedings for the recovery of a debt, his agent will not be allowed to carry on an action for the mere purpose of running up an account of expenses: a tender of payment of the debt and the expenses previously incurred is sufficient to relieve the debtor of all liability for future ex-

How an agent's hypothec on costs is affected by a compromise by his client.

(d) *Crawford v. Gemmells*, 23 Dec. 1864, 3 Macph. 306.

(e) *Greig v. Christie*, 16 Dec. 1837, 16 S. 242. It has been held by the Sheriff-Substitute of Perthshire that an agent who makes good an alimentary fund is not entitled, in a question with his client, to a preference thereon for the amount of his account; *A. v. B.*, 23 Feb. 1858, 2 Sheriff-Court Decisions, 152.

(f) *Hamilton v. Bryson*, 17 June 1813, 17 F.C. 378; *Macqueen v. Hay*, 29 Nov. 1854, 17 D. 107; *Brunsdon v. Allard*, 9 June 1859, 28 Law Journal, Queen's Bench, 306.

(g) *Anderson v. Walker*, 13 Jan. 1830, 8 S. 299; and *Macqueen v. Hay*, *supra* (d).

penses.(h) There are, however, certain exceptional cases, in which a law agent is entitled to be sisted as a party to a process, to the effect of getting decree for expenses in his own name, notwithstanding a discharge thereof by his client. In the case of *M'Lean v. Auchinvole*,(i) the majority of the Court held that there were three cases in which an agent is entitled to this privilege:—(1) where expenses have been actually found due; (2) where they follow as a necessary consequence from an interlocutor previously pronounced; and (3) where the parties have entered into a compromise for the purpose of defeating his claim.(j) Of these in their order.

Where expenses have been found due.

14. After a party has been found entitled to expenses by an interlocutor disposing of the cause, his agent is entitled to carry on the process in order to obtain decree for the expenses in his own name. This has been held where the party found entitled to his expenses has not appeared to support the finding in his favour in an appeal from the sheriff-court,(k) or under a reclaiming note to the Inner House;(l) or has discharged the expenses, whether expressly(m) or by implication, as in the case of a wife who, after raising an action of aliment against her husband, returns to live with him.(n) A delay of two years was held not sufficient to preclude an agent, who knew nothing about a compromise between the parties, from taking decree for expenses to which his client had been found entitled.(o)

(h) *Jameson v. Beatson*, 5 March 1769, 4 Pat. App. 27. See also *M'Innes v. M'Coll*, 3 June 1813, 17 F.C. 337.

(i) 29 June 1824, 3 S. 190 (N. E. 129), and 21 F.C. 553.

(j) *Bell's Com.* vol. ii. 38; *Bell's Prin.* § 1391; *Shand's Practice*, 1034; *M'Glashan's Sheriff-Court Practice*, 4th edition, p. 336.

(k) *Ferguson, Halliboy & Co. v. Richardson*, 8 July 1826, 4 S. 814 (N. E. 821); *Macgregor & Barclay v. Martin*, 12 March 1867, 5 Macph. 583.

(l) *Hamilton v. Dixon*, 9 July 1824, 3 S. 242 (N. E. 170); and *Session Papers in Rox v. Stewart*, 3 July 1818, 19 F.C. 545. In the case of *Nicol v. Anderson's Trs.*, 19 June 1829, 1 Deas & Anderson, 204, a party who had been found entitled to expenses having died during the dependence of a reclaiming note against that finding, his agent was allowed to sist himself as a party.

(m) *Barr v. Wotherspoon*, 12 Dec. 1850, 13 D. 305; and cases *supra* (l).

(n) *Macgregor & Barclay v. Martin*, *supra* (k).

(o) *Barr v. Wotherspoon*, *supra* (m).

The question has been raised whether when expenses have been found due to a litigant, who thereafter disclaims the process, his agent is entitled to carry it on, in order to show that he was properly authorised, and to support the finding of expenses.(p)

15. When an agent takes decree for expenses in name of his client, and does not interpel the opposite party from paying them to the client, the latter is, of course, in the ordinary case, entitled to enter into any arrangement whereby the expenses may be discharged. But in order to defeat the claim of the agent-disburser, the expenses must be clearly included in the discharge. Thus, in the case of *M'Millan v. Kennedy*,(q) a party who was charged in virtue of a decree for expenses which had been obtained in a process of suspension and liberation, and against whom there existed a claim of damages, having got from the party in whose name the charge had been given a discharge in general terms, containing a disclamation of the suspension and charge, the Court held that the discharge could not be supposed to include the expenses by implication.

Discharge of expenses after decree is extracted in client's name.

16. It is now quite settled that after an interlocutor has been pronounced which carries expenses by necessary implication, the parties cannot settle the action by a compromise so as to defeat the right of the agent of the successful litigant to obtain decree for his expenses against the opposite party.(r) The meaning of the expression "necessary implication" may be best explained by examples. In *Hamilton v. Bryson*,(s) it was held that when damages had been

Where expenses follow as a necessary consequence.

(p) *Noble v. Magistrates of Inverness*, 8 Feb. 1825, 3 S. 516 (N.E. 358).

(q) 4 July 1834, 12 S. 882.

(r) See cases *infra*; and Bell's Com. vol. ii. 38. "There is a great difference between the case where a judgment has been pronounced either finding expenses due, or necessarily importing such a finding, and the case where there is only a chance that expenses will be found due. In the former case, to lay a foundation for the agent's claim, it is no matter whether there be *mala fides* or not. In the latter, *mala fides* is essential;" *Per* Lord Glenlee in *M'Lean v. Auchinvole*, 29 June 1824, 3 S. (N. E.) 129.

(s) 17 June 1813, 17 F.C. 378. The case of *Rox v. Stewart*, 3 July 1818) very briefly reported in 19 F.C. 545, is said to have been decided on the principle of *Hamilton v. Bryson*; but the Session Papers show that expenses

awarded to the pursuer, though the amount was not actually assessed, the expenses followed as a matter of course. But if there has been no verdict or interlocutor finding damages to be due, there is nothing to prevent a compromise of both the action and the expenses.^(t) In two cases it was held that when an interlocutor has been pronounced virtually finding that a party has been illegally imprisoned, this necessarily implies a right to the expenses of regaining his liberty.^(u) Again, in an action of count and reckoning, in which a report had been obtained from an accountant, exhibiting three views, under any of which the defender was indebted in a considerable balance, the pursuer's agent was held entitled to sist himself and carry on the action, notwithstanding a discharge granted by his client.^(v)

Doctrine of
early cases
questioned.

17. The authority of these decisions was somewhat impaired by *obiter dicta* in two more recent cases. In the first, a son claimed legitim from his father's trustees, who pleaded in defence that the claim had been extinguished during the father's lifetime. The Lord Ordinary repelled the defences, and appointed the defenders to lodge a state of the executry, reserving all questions of expenses. In the meantime the pursuer wrote to his agent, requesting to know what his share of legitim would probably come to; who would have to pay the expenses; and, in the event of his receiving an offer, what he ought to take. The agent, in reply, requested the pursuer to communicate with him before acceding to any proposal of settlement, and stated that he thought the defenders would be found liable in

had been actually found due by the Sheriff and the Lord Ordinary, and that, during the dependence of a reclaiming note, advantage was taken of the party's ignorance and necessities to obtain from him a discharge on unfair terms.

(*t*) *M'Lean v. Auchinvole*, 29 June 1824, 3 S. 190 (N. E. 129); *Macqueen v. Hay*, 29 Nov. 1854, 17 D. 107. See also *Anderson v. Walker*, 13 Jan. 1830, 8 S. 299.

(*u*) *Sloss & Gemmell v. Kennedy*, 28 May 1823, 2 S. 344 (N. E. 302), and *M'Lean v. Auchinvole*, *supra* (*t*).

(*v*) *Cheyne v. Cheyne*, 18 Jan. 1832, 10 S. 202. It may be observed that in this case Lord Balgray regarded the discharge as a collusive device between the parties.

expenses. This correspondence was communicated to the defenders, but they nevertheless settled the case with the pursuer. In these circumstances, the Court refused to allow the agent to sist himself for the purpose of obtaining decree for his expenses.(x) There was here no interlocutor carrying expenses by necessary implication, for the Lord Ordinary had expressly reserved all questions of expenses. But the opinions expressed by Lord Justice-Clerk Hope and Lord Cockburn were extremely unfavourable to the right of an agent to carry on an action in any circumstances except where expenses have been actually found due, or the parties have entered into a collusive device to defeat his claim. The second of the cases referred to was an action of damages, in which, after the record had been closed, and while issues were being adjusted, the parties entered into a settlement without the intervention of their agents. The agent of the pursuer then craved to be allowed to sist himself, on the ground that the parties had entered into a collusive device to defeat his claim. He founded, however, solely upon the terms of discharge, which merely set forth that the action had been compromised by the defenders paying a lump sum in full of all claims. The Court, however, held that the discharge was insufficient *per se* to prove collusion, and accordingly refused to allow the agent to sist himself.(y) There is obviously nothing in this decision that can be supposed to derogate from the rule that an agent-disburser acquires a *jus quæsitum* in an action as soon as an interlocutor has been pronounced which carries expenses by necessary implication. But some observations were made by Lord Justice-Clerk Hope and Lord Wood adverse to the agent's right in such circumstances.

18. In two cases, very recently decided, these *obiter dicta* have, however, been disregarded, and effect given to the rule laid down in *M'Lean v. Auchinvole*. The first of these, *Macgregor & Barclay v. Martin*,(z) was an action for interim aliment, raised in the sheriff-court by a wife against her

Former rule
reverted to.

(x) *Murray v. Kidd & Others* (Roger's Trs.), 14 Feb. 1852, 14 D. 501.

(y) *Macqueen v. Hay*, 29 Nov. 1854, 17 D. 107.

(z) 12 March 1867, 5 Macph. 583.

husband. After a proof had been led, the sheriff pronounced an interlocutor finding it established that the defender had been guilty of such an amount of *scævitia* towards the pursuer as to justify her in living separate from him, and accordingly decerning against him for a weekly amount of aliment, and finding him liable in expenses. The husband having brought this judgment under review of the Court of Session, the Court gave interim decree for a weekly amount of aliment, and for a certain sum of expenses, and superseded farther consideration of the cause to admit of the wife instituting an action of separation and aliment, if so advised. The wife having subsequently returned to live with her husband, so as in effect to discharge the action, the Court allowed her agents to sist themselves as parties to the action, and to obtain decree in their own name against the husband for the expenses found due to the wife in the sheriff-court, and also for the expenses in the Court of Session, under deduction of the payments made under the interim decrees for expenses. The second of the cases referred to, *Cornwall v. Walker*,^(a) was an action at the instance of a woman who had obtained a decree of divorce against her husband, to recover from him the amount of terce and *jus relicte* due to her upon the dissolution of the marriage. The defender denied his liability, but the Lord Ordinary decerned against him for an *interim* sum, and remitted to an accountant to ascertain and report on the nature and extent of his property. While the case was before the accountant, the parties came to an extrajudicial compromise, by which the pursuer agreed to accept a certain sum as in full of her claims under the action. Her agents were not consulted in the matter, and the discharge was revised by another agent, employed for that purpose only. The pursuer having immediately thereafter left the country, her agents craved to be allowed to sist themselves as parties to the cause, with a view to recover their expenses from the defender. This motion was granted by the Lord Ordinary, to whose judgment the Court adhered, Lord Kinloch, however, dissented, as he was of opinion that an agent's right to

(a) 18 March 1871, 8 Scot. Law Rep. 442.

be sisted should be restricted to cases where an award of expenses was on the point of being pronounced, but was prevented by the settlement from going out. But Lord President Inglis observed,—“ Lord Kinloch has introduced a new expression into our phraseology on this point. He says that an agent is not entitled to insist, unless the expenses were *on the point of being found due*. That expression is quite an invention of to-day; I do not know exactly what it means; and I am very jealous of admitting it. I like the expression used in *M'Lean's* case much better, though even that may not be very accurate, as the finding of expenses never is a necessary result or consequence—it is always in the discretion of the Court, and depends more or less upon how the litigation has been carried on. The true rule is that the agent is entitled to sist himself and prosecute the case to obtain a finding of expenses in his favour, where such a finding is the legitimate consequence of what has been already done.”

19. A comparison of these cases with *Smith v. Smith* (b) will help to show how far an action must proceed before an agent acquires any right to carry it on for his interest in the expenses. This was an action of separation and aliment at the instance of a wife against her husband, on the ground of cruelty. The record was closed, and a day fixed for the proof; but on the day appointed for leading the proof no appearance was made for the pursuer, who had become reconciled to her husband and returned to the house. In these circumstances, the Court held that the wife's agent was not entitled to be sisted as a party to the action, for the purpose of enabling him to get decree for his expenses against the husband. Generally speaking, then, it may be said that decree for expenses must follow as a direct consequence from the interlocutor pronounced, without any further discussion on the merits of the case.(c)

How far
action must
have pro-
ceeded.

20. In regard to the law of England on this subject, it may be observed, that while there is ample authority to the

Law of Eng-
land on the
subject.

(b) 21 Feb. 1871, 9 Macph. 538.

(c) See opinion of Lord Medwyn in *Murray v. Kidd*, 14 Feb. 1852, 14 D. 501.

effect that an attorney must make out a case of collusive settlement between the parties before he can be allowed to carry on an action which has been compromised, (d) it must be taken in connection with the doctrine that an attorney has a lien on property recovered or preserved through his instrumentality. (e) The most recent cases seem to establish the principle that if the result of the proceedings is doubtful at the time of the settlement, there is no existing fund or security upon which any lien can attach, (g) but that, on the other hand, a fund may be regarded as recovered or preserved through the instrumentality of an attorney, where the objects of the litigation have been substantially obtained, even although final judgment has not been pronounced. (h) The law of Scotland, as we have already seen, does not allow to a law agent any

(d) The general rule of English law is, that the parties may compromise an action and costs without regard to the prospective lien of their attorneys, provided the settlement is not entered into collusively for the purpose of defrauding one of the attorneys of his costs; *Chapman v. Haw*, 30 June 1808, 1 Taunton, 301; *M'Pherson v. Allsopp*, 7 June 1839, 8 Law Journal, Exchequer, 262; *Quested v. Callis*, 25 May 1842, 10 Meeson & Welsby, 18; *Clark v. Smith*, 27 Jan. 1844, 13 Law Journal, Common Pleas, 97; *Jordan v. Hunt*, 1855, 3 Dowling, P. C. 666; *Verity v. Wild*, 11 Feb. 1859, 28 Law Journal, Chancery, 561; *Brunsdon v. Allard*, 9 June 1859, 28 Law Journal, Queen's Bench, 306. Even when the plaintiff sues *in forma pauperis*, he may enter into any *bona fide* settlement, though it has been observed that such settlements should be watched with considerable jealousy; *Francis v. Webb*, 16 April 1849, 7 Manning, Granger & Scott, 731; *James v. Bonner*, 12 May 1848, 17 Law Journal, Exchequer, 343. Most of the decisions will be found collected in Lush's Practice, 3d edition, i. 331, and Stokes on Liens of Attorneys, 112.

(e) *Ante*, p. 193. "The lien which an attorney is said to have on a judgment (which is perhaps an incorrect expression) is merely a claim to the equitable interference of the Court to have that judgment held as a security for his debt."—*Per Parke, B.*, in *Barker v. St Quintin*, 22 Jan. 1844, 12 Meeson & Welsby, 441. See also *Ex parte Games*, *in re Williams v. Lloyd*, 13 June 1864, 28 Law Journal, Exchequer, 317.

(g) *In re Sullivan v. Pearson*, *ex parte Morrison*, 24 Nov. 1868, 4 Law Reports, Queen's Bench, 153. See also *Walsh v. Delany*, 23 Nov. 1842, 5 Irish Law Reports, 205.

(h) *Twynam v. Porter*, 24 Nov. 1870, 11 Law Reports, Equity, 181. See also *Grace v. Lewis*, 24 Nov. 1854, 4 Irish Common Law Reports, 491.

hypothec over the fund in dispute; (i) but the analogy of the law of England seems rather favourable than adverse to the rule that an agent has a hypothec on costs when the result of the proceedings is no longer doubtful—in other words, when an interlocutor has been pronounced which carries expenses by necessary implication.

21. An agent is entitled to be sisted, to the effect of proving that a collusive device has been entered into by the parties to an action for the purpose of defeating his claim for expenses, and that his client would have been found entitled to expenses if he had proceeded with the action. (k) Collusion, however, will not be readily inferred. (l)

Where no parties have entered into a collusive device to defeat agent's claim.

(i) *Ante*, p. 193.

(k) *Murray v. Kidd and others* (Roger's Trs.), 14 Feb. 1852, 14 D. 501; *Tod and Wright v. Wilson and M'Lellan*, 7 Mar. 1822, 1 S. 381 (N. E. 358); *Macqueen v. Hay*, 29 Nov. 1854, 17 D. 107. See also *Jameson v. Beatson*, 5 March 1769, 4 Pat. App. 27. The rule is equally well settled in England that the parties to an action cannot make a collusive settlement between themselves for the purpose of defrauding an attorney of his claim for costs. See cases *supra* (d), and *Lush's Practice*, 3rd ed., i. 331; *Archbold's Practice*, 12th ed., i. 139; *Pulling's Law of Attorneys*, 5th ed., 383; *Stokes on Liens of Attorneys*, 114; *Gould v. Davies*, 1831, 1 Crompton and Jervis, 415; and *ex parte Games, in re Williams v. Lloyd*, 13 June 1864, 33 Law Journal, Exchequer, 317.

(l) *Murray v. Kidd*, and *Macqueen v. Hay*, *supra*; *Lush's Practice*, 3rd ed., i. 332; *Francis v. Webb*, 16 April 1849, 7 Manning, Granger & Scott, 731; *Nelson v. Wilson*, 21 May 1830, 6 Bingham, 568.

CHAPTER XV.

HYPOTHEC OR LIEN OF LAW AGENTS OVER DOCUMENTS.

General
nature of
law agents'
hypothec
over docu-
ments.

1. Law agents are entitled to retain, in security of their business accounts, any documents belonging to their clients which may come into their possession in the course of their employment. (a) This privilege appears to have been introduced by general usage as early as the seventeenth century; (b) and its effect and extent have been well settled by a consistent series of decisions. In many respects it is a peculiar and anomalous kind of right. By the law of Scotland, title-deeds and documents of debt (other than those in which the debt is inseparable from the document, as in bills and promissory-notes) cannot be made the subjects of pledge; (c) and it is only when there exists between creditor and debtor the relation of agent and client, that the mere possession of the debtor's papers can operate as a security for debts unconnected with the particular contract under which the possession has been obtained. (d) Moreover, even when the creditor is the law agent of the debtor, his security is restricted to the amount of his

(a) Ersk. iii. 4. 21; More's Notes to Stair, p. 84; Bell's Com. vol. ii. 111; Bell's Prin. § 1438.

(b) Cuthberts v. Ross, 1 July 1697, 4 Br. Sup. 374; Ayton v. Colville, 23 Nov. 1705, M. 6247.

(c) Bell's Com. vol. ii. 23 and 24; Christie v. Ruxton, 27 June 1862, 24 D. 1182.

(d) See opinion of Lord Fullerton in Menzies v. Murdoch, 15 Dec. 1841, 4 D. 257, and Inglis v. Moncrieff, 7 Feb. 1851, 13 D. 622; and cases *infra* (n).

accounts for professional services.(e) This anomalous kind of security confers no active right on the law agent,(g) but resolves into the inconvenience which a proprietor or creditor may suffer from being deprived of the evidence of his right.(h)

2. This exceptional privilege of law agents is generally called a *hypothec*, but the expression is inaccurate.(i) It is merely a general lien or right of retention, not amounting to a real right either of *hypothec* or of pledge.(k)

3. Attorneys and solicitors in England enjoy a similar privilege;(l) and English decisions are sometimes referred to in Scotch cases.(m) There is very little difference in point of principle between the laws of the two countries relating to this subject. But comparatively few decisions of the English courts can be regarded as authorities in Scotland, most of them being dependent on peculiarities of English law and forms of procedure. The text of this chapter, therefore, rests entirely on Scotch authorities, reference being made in the foot-notes to such English cases as appear at all applicable to our system of jurisprudence.

4. From the preceding remarks on the nature of the privilege, it will be seen that a general lien over documents can be competently claimed only in the case of their having been deposited with, or having come into the possession of a law agent,(n) who has been duly authorised to act.(o) Bankers,

(e) See *post*, p. 211.

(g) Bell's Com. vol. ii. 112; Bell's Prin. § 1441.

(h) *Christie v. Ruxton*, *supra* (c).

(i) Bell's Com. vol. ii. 111; Just. Inst. iv. 6. 7; and opinion of Lord Mackenzie in *Renny and Webster v. Myles*, 8 Feb. 1847, 9 D. 619.

(k) *Christie v. Ruxton*, *supra* (c).

(l) Pulling's Law of Attorneys, 5th edition, p. 368; Stokes on Liens of Attorneys.

(m) *Kemp v. Young, &c.*, 13 Feb. 1838, 16 S. 500; *Gray v. Graham*, 14 Aug. 1855, 18 D. (H. L.) 52, and 2 Macq. 435; Bell's Com. vol. ii. 112 and 114.

(n) *York Buildings Co. v. Dalrymple*, 22 Dec. 1738, Elch., *Hypothec*, No. 9, and 1 Bell's Ill. 465; *M'Donald v. Taylor*, 27 Feb. 1813, 17 F.C. 234; cases *supra* (d); *Hollis v. Claridge*, 12 May 1813, 4 Taunton, 807.

(o) *Walker v. Phin*, 8 June 1831, 9 S. 691; *Kerr v. Beck*, 6 Feb. 1849, 11 D. 510; *Pratt v. Vizard*, 20 Nov. 1833, 5 Barnewall & Adolphus, 308.

indeed, have a general lien over paper securities in their hands, belonging to their customers; (*p*) but there is no authority in the law of Scotland for extending this lien to any documents other than negotiable securities, (*q*) and shares of the bank's own stock, standing in name of a customer. (*r*) Non-professional men may, however, in certain cases have a particular or special lien; that is to say, they may keep possession of papers which form the subject of a contract till the counter obligation be performed. (*s*) Thus, an accountant has been held entitled to retain, till payment of his fee, vouchers and documents put into his hands in order that he might draw up a report under a remit from the Court. (*t*)

The right is transmissible to agent's representatives, &c.

5. But although a general lien over documents can be created only where there exists the relation of agent and client, yet the right, once created, may be claimed by certain persons other than the law agent himself. On his death it passes to his personal representatives, (*u*) or on his bankruptcy, to the trustee on his sequestrated estate. (*v*) But the right of the trustee is commensurate with the right of the law agent; so that if the latter would have been barred *personali exceptione* from claiming a lien, the trustee cannot enforce it. (*x*) It has never been decided in Scotland whether

(*p*) Addison on Contracts, 6th edition, p. 430; Smith's Mercantile Law, 8th edition, p. 557; Parson's Law of Contracts, iii. 262; Thomson on Bills (Dove Wilson's edition) p. 556.

(*q*) 2 Bell's Com. 24 and 118; Christie v. Ruxton, *supra* (*e*).

(*r*) Hotchkis v. Royal Bank, 11 March 1796, M. 2673, and 28 Nov. 1797, 3 Pat. App. 618; Burns v. Lawrie's Trs., 7 July 1840, 2 D. 1348.

(*s*) Bell's Prin. §§ 1411 and 1419; York Buildings Co. v. Robertson, 6 July 1805, M. Appx. Hypothec, No. 2; Hollis v. Claridge, *supra* (*n*).

(*t*) Stuart v. Stevenson, 13 Feb. 1828, 6 S. 591; see also Bruce v. Edinburgh Trustees, 7 Feb. 1835, 13 S. 437. As to liens over policies of insurance, see Scott & Gifford v. Sea Insurance Co., 22 Jan. 1825, 3 S. 467 (N. E. 325); Wilmot v. Wilmot, 6 March 1841, 3 D. 815; Losh, &c. v. Douglas, 18 Nov. 1857, 20 D. 58.

(*u*) Wilson v. Lumsdaine, 29 June 1837, 15 S. 1211; Paul v. Meikle, 11 Dec. 1868, 7 Macph. 235; Redfearn v. Sowerby, 12 Feb. 1818, 1 Swanston, 84; Pelly v. Wathen, 30 March 1849, 18 Law Journal, Chancery, 281, and 7 Hare, 351.

(*v*) Paul v. Dickson, 1 June 1839, 1 D. 867; Inglis v. Moncrieff, 7 Feb. 1851, 13 D. 622.

(*x*) Inglis v. Moncrieff, *supra* (*v*).

a law agent assigning his claim against a client for a business account, can confer on the assignee the benefit of his lien. Where the assignee is himself a law agent, and especially where he is also employed by the client, there appears to be no objection in principle to such an assignment.(y) But it is thought that there is no sufficient reason for extending the exceptional privilege of law agents to non-professional persons who are not equally amenable to the summary jurisdiction of the Court.(z)

6. Two law agents may be entitled at the same time to a lien over the same papers for their respective accounts. This may happen either where a country agent sends his client's papers to a town agent,(a) or where a client em-

May be claimed by more than one agent at the same time.

(y) See opinion of Lord Cuninghame in *Renny v. Rutherford*, 27 Feb. 1840, 2 D. 676, and 1 July 1841, 3 D. 1134; and also opinion of Lord Balgray in *Inglis & Weir v. Renny*, 23 June 1825, 4 S. 113 (N. E. 114).

(z) See opinion of Lord Fullerton in *Renny & Webster v. Myles*, 8 Feb. 1847, 9 D. 619. It has been held that a party who pays the whole expenses of a judicial remit to an accountant, does not thereby acquire an assignation to the accountant's lien over the report; *M'Queen v. Dickie*, 18 Jan. 1851, 13 D. 502. But, on the other hand, it has been held in equity in England, that a solicitor may assign to a banker a debt due to him for costs, with the benefit of any lien he may have; *Bull v. Faulkner*, 19 Dec. 1848, 2 De Gex & Smale, 772. It has also been decided that an attorney may enforce his lien, notwithstanding of his having since the documents came into his hands, ceased to practise (*Hope v. Liddell*, 30 June 1855, 7 De Gex, Macnaughten & Gordon, 331), or entered into partnership (*Pelly v. Wathen*, 30 March 1849, 18 Law Journal, Chancery, 281). And although, by the deaths or retirements of partners a firm has changed its name, it may enforce a lien for costs earned by the original firm; *Gregory v. Cresswell*, 17 April 1845, 14 Law Journal, Chancery, 300.

(a) 2 Bell's Com. 112; *Walker v. Phin*, 8 June 1831, 9 S. 691. By the law of England, a London agent has a general lien as against the attorney employing him; but he has no direct lien against the client. He can claim only through the lien which his debtor the attorney employing him possesses. The measure of this right thus depends on the amount due from the client, when notice of the agent's claim is given him. *Lush's Practice*, 3d edition, i. 346; *Pulling's Law of Attorneys*, 5th edition, p. 447; *Waller v. Holmes*, 10 Nov. 1860, 30 Law Journal, Chancery, 24; *In re Andrew*, 18 June 1861, 30 Law Journal, Exchequer, 403.

playing two law agents, requests one of them to lend his papers to the other.(b)

What
papers are
subject to a
law agent's
lien.

7. A law agent's lien extends to title-deeds, securities, documents of debt, and all other papers properly belonging to his client,(c) but not to judicial proceedings or papers of which he has got possession through their having been produced in process.(d) At any time that a client is not bankrupt, but is master of his own affairs, he may create a lien over any documents belonging to himself, by handing them over to his law agent.(e) In the case of title-deeds, the question has frequently arisen whether they properly belonged to the party whose agent claimed a lien over them. On this subject the following rules may be laid down:—1. The proprietor of an estate in fee simple may hypothecate the title-deeds even after he has been inhibited,(g) or after he has granted a security over the estate, with the usual assignation of writs.(h) 2. An heir who has made up no title, but has possessed on apparenecy for three years, has the same power over the title-deeds as if he had completed his

(b) *Renny v. Ruthierford*, 27 Feb. 1840, 2 D. 676, and 1 July 1841, 3 D. 1134.

(c) 2 Bell's Com. 112; Bell's Prin., § 1438; see also *In re Leah*, 23 March 1860, 6 English Jurist, N.S., 387; *Richards v. Platel*, 14 Jan. 1841, 1 Craig & Phillip, 79; *Jones v. Turnbull*, 1837, 5 Dowling, 591.

(d) *Callman v. Bell*, 28 Nov. 1793, F.C. and M. 6255. See also Stokes on Liens of Attorneys, p. 12; and *Ross v. Laughton*, 11 March 1813, 1 Vesey & Beames, 349. It has been held in England that a solicitor's lien is not confined to deeds and papers, but extends to articles delivered to him for the purpose of being exhibited to witnesses at a trial; *Friswell v. King*, 28 April 1846, 15 Simon, 191. As to the lien of an attorney or solicitor, who has ceased to act, over papers relating to a depending law-suit, see Stokes on Liens of Attorneys, p. 46; Pulling's Law of Attorneys, 5th edition, p. 376; *In re Faithfull*, 9 May 1868, 6 Law Reports, Equity, 325; and *Robins v. Goldingham*, 19 Jan. 1872, 13 Law Reports, Equity, 440.

(e) 2 Bell's Com. 93; see also opinion of Lord President Boyle in *Menzies v. Murdoch*, 15 Dec. 1841, 4 D. 257; *Ex parte Lee*, 23 Nov. 1793, 2 Vesey junior, 285; and *In re Leah*, 23 March 1860, 6 English Jurist, N.S., 387.

(g) *Menzies v. Murdoch*, *supra* (e).

(h) See cases referred to, *post*, p. 220, as to validity of lien as against third parties.

title.(i) 3. An heir apparent, not in possession, but carrying on a process of ranking and sale of his ancestor's estate, cannot hypothecate the title-deeds, as against the creditors of the ancestor, for an account incurred by himself.(k) 4. A proprietor whose own right to the estate is limited, can hypothecate his title-deeds only under the limitations contained in his title. Thus, an heir of entail cannot create a lien over the title-deeds of the estate, except for the period of his own life; on his death they pass to the next heir entitled to succeed, free from any claim of hypothec.(l) 5. A trustee on a sequestrated estate may hypothecate the title-deeds of the bankrupt to the law agent in the sequestration; but it has been observed by the Court that he ought to keep them in his own custody, and should not deliver them to an agent.(m) 6. A company cannot hypothecate the private title-deeds of a partner for an account due by the firm.(n)

8. It is not necessary that the papers over which a law agent claims a hypothec should be deposited with him by the client himself, or for the express purpose of creating a lien,(o) or that they should come into his hands in the prosecution of the particular business charged in his account.(p) But they must come into his possession lawfully, and be lawfully retained.(q) Thus, an agent cannot claim a lien over papers which he has obtained from a client on false pretences, or on an obligation to hand them over to another

How papers
must come
into law
agent's pos-
session.

(i) *Cameron v. Burns*, 25 June 1824, 3 S. 176 (N. E. 118); see also opinion of Lord Corehouse in *Callander v. Laidlaw*, 11 Feb. 1834, 12 S. 417.

(k) *Orme v. Barclay*, 18 Nov. 1778, M. 6251.

(l) *Callander v. Laidlaw*, 11 Feb. 1834, 12 S. 417; *Scott v. Thomson*, 6 Dec. 1854, 17 D. 124.

(m) *Paul v. Mathie*, 2 Feb. 1826, 4 S. 420 (N. E. 424).

(n) *Skinner v. Paterson*, 31 May 1823, 2 S. 354 (N. E. 312); *Turner v. Deane*, 12 May 1849, 18 Law Journal, Exchequer, 343.

(o) *Kerr v. Beck*, 6 Feb. 1849, 11 D. 510. See also *Stevenson v. Blacklock*, 28 May 1813, 1 Maule & Selwyn, 534.

(p) *Menzies v. Murdoch*, 15 Dec. 1841, 4 D. 257; *Ex parte Nesbitt*, 24 Jan. 1805, 2 Schoales & Lefroy's Irish Chancery Cases, 279.

(q) 2 Bell's Com. 111; and Bell's Prin. § 1438. See also *Callman v. Bell*, 28 Nov. 1793, F.C.; and M. 6255.

party, or to return them at a particular time; though in the latter case a client may be held to have waived his right by not insisting on the fulfilment of the obligation.(r) It is also necessary that the papers come into the agent's possession "in the course of his employment."(s) Thus, it was held, in a question between a law agent and a prior creditor holding a bond over his client's property, that the agent had no lien over title-deeds which came into his possession after his agency had ceased.(t) In a question, however, between agent and client, the phrase quoted from Mr Bell ("in the course of his employment") must not be too rigorously construed;(u) for in one case it was held that an agent was entitled to a lien over title-deeds of which he had obtained possession shortly before the commencement of his employment.(x)

Papers put
into agent's
hands for a
special pur-
pose.

9. It is stated by Professor Bell that an agent has no lien over papers which have been put into his hands for a special purpose inconsistent with the claim of retention.(y)

(r) *Kerr v. Beck*, 6 Feb. 1849, 11 D. 510; *Cameron v. Burns*, 25 June 1824, 3 S. 176 (N. E. 118). See also *Ex parte Pemberton*, 13 August 1810, 18 Vesey, 282.

(s) 2 Bell's Com. 111; and Bell's Prin. § 1438. It has been held in England that a solicitor has no lien on papers delivered to him as steward; (*Champernown v. Scott*, 24 March 1821, 6 Maddock, 93); or as mortgagee (*Pelly v. Wathen*, 30 March 1849, 18 Law Journal, Chancery, 281; and *Vaughan v. Vanderstegen*, 19 July 1854, 2 Drury, 408); and that a town-clerk has a lien on papers of the corporation, with respect to which he has done work as attorney or solicitor, but not on such as he holds merely as town-clerk; *Rex v. Sankey*, 11 June 1836, 5 Adolphus & Ellis, 423.

(t) *Renny & Webster v. Myles*, 8 Feb. 1847, 9 D. 619. It has been held in England that a solicitor has no lien for costs due to himself solely upon papers which come for the first time into the joint possession of himself and partners subsequently assumed; *In re Forshaw*, 20 Dec. 1847, 17 Law Journal, Chancery, 60; and *Pelly v. Wathen*, *supra* (s); and conversely, when papers come into a solicitor's possession after the dissolution of a partnership, he has no lien over them for costs incurred to the firm, even although such costs have been assigned to him; *Vaughan v. Vanderstegen*, 19 July 1854, 2 Drury, 409.

(u) *Stevenson v. Blakelock*, 28 May 1813, 1 Maule & Selwyn, 535.

(x) *Kerr v. Beck*, *supra* (r).

(y) 2 Bell's Com. 93 and 112; Bell's Prin. § 1439.

But the only case to which he refers^(z) does not seem sufficient to support this proposition, all that was decided in that case being, that a party had not freed himself from an obligation to make a deed forthcoming, by handing it over to a law agent, in order that the latter might consider whether he would accept a security over the property of which it formed a title-deed. In an old case, it was held that an agent was entitled to retain papers put into his hands for the purpose of being produced in various processes which he was employed to conduct.^(a) It would, no doubt, be held that an agent is bound, notwithstanding his lien, to produce papers which he has received for the express purpose of producing them in a particular process;^(b) but there is no authority in the law of Scotland opposed to the English rule that, provided papers come into an attorney's hands in the course of his professional employment, and are permitted to remain with him, it is of no consequence what was the particular purpose for which they were intrusted to him, unless a special agreement was entered into that the papers should be returned when the particular purpose was fulfilled.^(c)

10. The lien of a law agent being general, it covers not only the account incurred to him in the particular employ-

What accounts and charges are covered by lien.

(z) *Chisholm v. Fraser*, 8 March 1825, 4 S. 113 (N. E. 114), and 1 Bell's Ill. 463.

(a) *Finlay v. Syme*, 23 Jan. 1773, M. 6250.

(b) See the case of *Callman v. Bell*, 28 Nov. 1793, F.C.; and M. 6255. It has been held in England that a solicitor receiving papers from a client for the purpose of producing them in a cause is bound so to produce them, notwithstanding his lien; but he is not bound without payment to deliver them up, or to produce them in any other business; *Ross v. Laughton*, 11 March 1813, 1 Vesey & Beames, 349.

(c) *Ex parte Sterling*, 7 Aug. 1809, 16 Vesey, 258, in which Lord Chancellor Eldon observed—"If in the general course of dealing the client from time to time hands papers to his attorney, and does not get them again when the occasion that required them is at an end, the conclusion is that they are left with the attorney upon the general account. If the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, there must be a special agreement; otherwise they are subject to the general lien which the attorney has upon all papers in his hands." See also *Stevenson v. Blakelock*, 28 May 1813, 1 Maule & Selwyn, 534; and *Ex parte Pemberton*, 13 Aug. 1810, 18 Vesey, 282.

ment in the course of which his client's papers came into his possession, but also the general balance due on his accounts for professional services.(d) It extends to accounts incurred before, as well as accounts incurred after, the papers have come into an agent's hands;(e) and when one agent has lent a client's papers to another agent also employed by the client, the lien of the former is held to cover accounts subsequently contracted.(g) The accounts in respect of which a lien is claimed must, of course, have been incurred by the owner of the papers so retained. Thus, a law agent who has acted for a partner in a firm, and also for the firm, has no lien on the private papers of the partner, in respect of the accounts incurred by the firm.(h) The lien of a country agent has been held to cover not only accounts incurred to himself, but also those incurred to a town agent employed by him to act for his client;(i) and the lien of a Scotch law agent covers the amount paid by him to a parliamentary solicitor for his professional account in an appeal to the House of Lords.(k) It has even been held that an agent employed to borrow money has a lien over his client's title-deeds for the account paid by him to the lender's agent.(l) In no case does a law agent's lien extend beyond the taxed amount of the accounts in respect of which it is claimed; but the taxa-

(d) See cases cited *infra*, and opinion of Lord Fullerton in *Menzies v. Murdoch*, 15 Dec. 1841, 4 D. 257; *Hollis v. Claridge*, 12 May 1813, 4 Taunton, 807; *In re Broomhead*, 1847, 2 Dowling & Lowndes, 52; *Stevenson v. Blakelock*, *supra* (c); and *In re Faithfull*, 9 May 1868, 6 Law Reports, Equity, 325.

(e) *Menzies v. Murdoch*, 15 Dec. 1841, 4 D. 257.

(g) *Renny v. Kemp*, 1 July 1841, 3 D. 1134.

(h) *Skinner v. Paterson*, 31 May 1823, 2 S. 354 (N. E. 312); *Turner v. Deane*, 12 May 1849, 18 Law Journal, Exchequer, 343. It has been held in England that where the directors of a joint-stock company carry on a business not authorised by the deed of settlement, the solicitors of the company have no lien for costs thereby incurred to them; *In re Phoenix Life Assurance Co.*, 28 July 1863, 1 Hemming & Miller, 433.

(i) *Walker v. Phin*, 8 June 1831, 9 S. 691; 2 Bell's Com. 112. See, however, *ante*, p. 148. The contrary has been held in England; *In re Andrew*, 18 June 1861, 30 Law Journal, Exchequer, 403.

(k) *Kemp v. Young, &c.*, 13 Feb. 1838, 16 S. 500.

(l) *Inglis & Weir v. Renny*, 23 June 1825, 4 S. 113 (N. E. 118).

tion is, of course, as between agent and client.^(m) The privilege, moreover, does not apply to all debts or claims that an agent may have against a client: it is strictly confined to professional charges, and disbursements properly made in the ordinary course of law agency.⁽ⁿ⁾ It does not cover a fixed annual salary as agent;^(o) nor does it even cover the amount of professional charges of an agent who ceases to act, after having agreed to conduct a lawsuit on the footing that he shall not claim from his client more than his outlays, unless expenses shall be recovered from the opposite party.^(p) It is not very easy to define what disbursements are covered by a law agent's lien, as falling within his proper duty or province.^(q) It has, however, been decided that he is not entitled to retain his client's papers in security of cash advances,^(r) commission on money transactions, whether stated in a lump sum or in detailed items,^(s) feu-duties,^(t) or composition paid to a superior, legacy or inventory-duty, or expenses of advertising a bleachfield.^(u) It has never

^(m) *Guthrie v. Ogilvie*, 3 Feb. 1830, 2 Jur. 193; *Walker v. Phin*, *supra* (i); *Gray v. Graham*, 21 May 1851, 13 D. 963, and 14 Aug. 1855, 18 D. (H.L.) 52, 2 Macq. 435; *Watson v. Maskell*, 1835, 1 Bingham's New Cases, 727.

⁽ⁿ⁾ 2 Bell's Com. 111; *Skinner v. Paterson*, 31 May 1823, 2 S. 354 (N. E. 312); *Kemp v. Young, &c.*, 13 Feb. 1838, 16 S. 500; and cases referred to *infra*. The English law on this point is the same as ours, though by special agreement a client may pledge his papers to an attorney in security of cash advances, &c.; *Worrall v. Johnson*, 2 Nov. 1820, 2 Jacob & Walker, 218; *Vaughan v. Vanderstegen*, 19 July 1854, 2 Drury, 408; *Christian v. Field*, 3 Dec. 1842, 2 Hare, 177.

^(o) *Cuthberts v. Ross*, 1 July 1697, 4 Br. Sup. 374. See also *York Buildings Co. v. Dalrymple*, 22 Dec. 1738, Elch. Hypothec, No. 9.

^(p) *Gilfillan v. Henderson*, 29 May 1828, 6 S. 880.

^(q) See opinion of Lord Fullerton in *Paul v. Dickson*, 1 June 1839, 1 D. 867; and *Richardson v. Merry*, 19 June 1863, 1 Macph. 940, *post*. p. 231.

^(r) *Christie v. Ruxton*, 27 June 1862, 24 D. 1182; and cases referred to *supra* (n).

^(s) *Paul v. Dickson*, *supra* (q).

^(t) *Grant's Reps. v. Robertson*, 28 Feb. 1801, 12 F.C., 507, and *M. Appx. Hypothec*, No. 1; *Skinner v. Paterson*, 31 May 1823, 2 S. 354 (N. E. 312).

^(u) *Skinner v. Paterson*, *supra* (t).

been decided whether a law agent has a lien for sums paid by him for the costs of one branch of a litigation in which his client has been found liable.(x) An agent's lien may, of course, be sustained as to one part of his account, while it is refused as to another part.(y)

Cautionary obligations not covered by lien.

11. It is quite settled that a law agent has no lien for the amount of cautionary obligations undertaken by him for a client, even although they have been entered into in the course of his professional employment;(z) and, on the same principle, a Scotch agent has been held to have no lien for a sum paid by him to relieve a parliamentary solicitor from recognizances into which he has entered for payment of costs to the respondent in an appeal to the House of Lords.(a)

Does lien cover expenses of action for payment of account?

12. It is doubtful whether the lien of a law agent extends to the expenses of an action properly brought, or of diligence properly used, against a client, in order to recover payment of a business account. In the only Scotch case in which the question was raised, the Court of Session held, in a competition between a law agent and the heritable creditors of a client, that the former had no lien for the expense of constituting his claim or of obtaining real security.(b) Opinions were expressed to the effect that in no case could there be a lien for accounts incurred after the relation of agent and client had ceased, and not on the employment of the client but for executing diligence against him. The case having been appealed to the House of Lords, the general doctrine thus enunciated was called in question, Lord Chancellor Cranworth observing—"I confess that on this part of the case I have very considerable doubts; because if a solicitor

(x) See note by Lord Ordinary Corehouse in *Kemp v. Young, &c.*, 13 Feb. 1838, 16 S. 500; and *Crowder v. Shee*, 30 July 1808, 1 Campbell, 437.

(y) *Guthrie v. Ogilvie*, 3 Feb. 1830, 8 S. 435; *Walker v. Phin*, 8 June 1831, 9 S. 691; *Huguenin v. Basely*, 23 Nov. 1807, 14 Vesey 301.

(z) *Grant's Reps. v. Robertson*, 28 Feb. 1801, M. Appx. Hypothec, No. 1; *Creditors of Lidderdale v. Naismith*, 5 July 1749, M. 6248.

(a) *Kemp v. Young, &c.*, 13 Feb. 1838, 16 S. 500.

(b) *Gray v. Graham*, 21 May 1851, 13 D. 963.

has a lien upon his client's deeds for costs incurred by him, and the client upon application refuses to pay those costs, and the solicitor is consequently driven to bring an action, undoubtedly by the law of England, according to all principle, though there is no direct authority upon the subject except a case very shortly reported, (c) the lien must extend as well to the costs of enforcing the bill of costs as to the costs incurred by the client himself." (d) The judgment of the Court of Session was, however, affirmed, on the ground that the expenses in question had been incurred by a law agent in making himself a creditor with real security, and that such expenses could not prejudice the rights of heritable creditors who had claims on the estate prior in date to the creation of the lien, although they might form a very good ground of retention as against the client himself. (e)

13. As has been already stated, a law agent has no lien or hypothec for cash advances. Even a special agreement between an agent and a client is insufficient to constitute a right of retention or pledge over unnegotiable documents, in security of an ordinary debt or of cash advances. (g) "By

Special
agreement
as to cash
advances.

(c) *Lambert v. Buckmaster*, 11 Feb. 1824, 2 Barnewall & Cresswell, 616, where it was held that an attorney had a lien upon papers belonging to bankrupt clients, not only for his bill for business done, but also for the costs of actions brought against the bankrupts subsequently to the issuing of the commission, to recover payment of his bill; Lord Chief-Justice Abbott observing—"I think the solicitor had the same right of lien against the assignees that he had against the bankrupts. Now, it is quite clear that as against them the lien would have extended to the costs of the two actions, and I think that he has a lien to that extent in this case against the assignees, unless it could be shown that he, as an attorney of this court, had improperly commenced the action. If, indeed, the debt had been tendered before the action was brought, that might have formed an answer to this claim for the costs of the actions, inasmuch as it would have been a defence to the action itself."

(d) 14 Aug. 1855, 2 Macq. 435; 18 D. (H.L.) 52.

(e) See also *Rattray v. Cruttenden & Co.*, 19 Feb. 1823, 6 S. 568.

(g) *Christie v. Ruxton*, 27 June 1862, 24 D. 1182. By the law of England, "if the owner of an estate or interest in land deposits his muniments of title with a creditor as a security for payment of a debt, or repayment of money advanced, the creditor or the lender has in equity a claim or charge upon the estate, which will bind the land in the hands

our law it is incompetent to impignorate title-deeds or mere documents of debt, so as to give a title of possession of these moveable subjects capable of competing with the right to vindicate their possession competent to the proprietor of the estate, or the creditor in the bond, who has acquired right to the estate, or to the debt, by singular and onerous title from the impignorator.”(h) It may, however, be held that a client who has agreed to allow his agent to retain his papers in security of cash advances is barred *personali exceptione* from demanding them back, until he has repaid the money lent him on the faith of such an agreement.(i)

Effect and
operation of
the lien.

14. The lien of a law agent is peculiar in this respect, that it cannot be made available for payment of his accounts in any other way than by occasioning inconvenience to the party deprived of his papers;(k) but in the case of these being required, the agent may thus secure full payment, or at least a preference over other creditors of the client. The purpose for which the papers may be required is immaterial, the agent being even entitled in virtue of his lien to refuse to produce them in a process for the purpose of instructing the claims or rights of his client.(l) But as this lien confers no active right, it does not stop or interrupt the triennial prescription applicable to agents' accounts;(m) and it has

of all subsequent purchasers who had notice of the deposit at the time they accepted a conveyance of the property, and will prevail over the claims of all subsequent registered creditors, and the claims of the assignees of a bankrupt or insolvent depositor;” Addison's Law of Contracts, chap. v. p. 275 of 4th edition. The recent cases on this subject will be found fully collected and discussed in *Shaw v. Foster & Pooley*, 14 March 1872, 5 Law Reports, Appellate Series, 321.

(h) *Per* Lord Benholme in *Christie v. Ruxton*, *supra* (g). See also *Coot v. Jecks*, 15 March 1872, 13 Law Reports, Equity, 597.

(i) 2 Bell's Com. 24; and opinion of Lord Neaves in *Christie v. Ruxton*, *supra* (g). See, however, *Grant's Reps. v. Robertson*, 28 Feb. 1801, M. Appx. Hypothec, No. 1.

(k) *Ferguson & Stewart v. Grant*, 8 Feb. 1856, 18 D. 536; *Christie v. Ruxton*, *supra* (g); *Bozon v. Bolland*, 12 Nov. 1839, 4 Mylne & Craig, 355; *Blunden v. Desart*, 27 Nov. 1842, 2 Drury & Warren, 417.

(l) *Finlay v. Syme*, 23 Jan. 1773, M. 6250.

(m) *Mason v. Earl of Aberdeen*, 29 Nov. 1709, M. 11,094; *Foggo v. M'Adam*, 22 Dec. 1780, M. 6252, and 2 Hailes, 875.

even been held that an agent's judicially claiming retention of a client's papers until payment of an account which he does not produce, does not interrupt the prescription of that account.⁽ⁿ⁾ The result is, that an agent pursuing for payment of a prescribed account can prove his case only by the writ or oath of his client, notwithstanding of his having possession of his client's papers. It was held in an old case that when an agent is sued for exhibition and delivery of papers, the exception or defence whereby he claims payment of his account does not prescribe while the papers are in his custody;^(o) but this decision seems very questionable.

15. The lien of law agents being a privilege of an exceptional nature, and capable of being oppressively used, it is subject to the equitable control of the Court, who will interfere to prevent its abuse.^(p) On the other hand, a summary petition and complaint may be presented against an agent for improperly causing the lien of another agent to be defeated.^(q)

Lien subject to the equitable control of the Court.

16. In the ordinary case a law agent is entitled to retain the papers of a solvent client until payment of his business accounts.^(r) But if his accounts are judicially disputed, he is bound to deliver the papers on consignment of the amount claimed by him.^(s) The Court will not interfere to compel

Delivery of papers on consignment of amount of disputed accounts.

(n) *Couper's Executors v. Ogilvy*, 26 Nov. 1753, M. 11,107.

(o) *Mitchel v. M'Adam*, 18 Jan. 1712, M. 11,096. See, however, *Foggo v. M'Adam*, *supra* (m). It has been held in England that the lien of an attorney remains effectual although his claim is barred by the Statute of Limitations; *In re Broomhead*, 9 June 1847, 16 Law Journal, Queen's Bench, 355. See also Bell's Prin. § 630, and cases there referred to.

(p) *Ferguson & Stewart v. Grant*, 8 Feb. 1856, 18 D. 536. See also *Callman v. Bell*, 28 Nov. 1793, F.C., and M. 6255.

(q) *Murray v. Sinclair*, 3 June 1847, 9 D. 594 and 1194.

(r) Cases referred to *supra*.

(s) *Drysdale or Craig v. Howden*, 24 May 1856, 18 D. 863. The English courts will not in ordinary circumstances order an attorney to deliver up papers on which he has a lien, upon the amount claimed being paid into court; but they appear to have authority to do so on a strong case being made out; *Clutton v. Pardon*, 24 July 1823, 1 Turner & Russell, 301; *Richards v. Platel*, 24 Jan. 1841, 1 Craig & Phillips, 79; *Blunden v. Desart*, 2 Dec. 1842, 2 Drury & Warren, 405; *In re Broomhead*, *supra* (o).

a law agent to accept caution in lieu of his lien, unless a special case can be made out, such as the probability of detriment to an estate from the want of the title-deeds, or some urgent necessity for their delivery.^(t)

Delivery of documents to trustee of bankrupt client.

17. The bankruptcy of a client materially affects the right of his agent to retain his papers. As it is essential to the due management of a sequestrated estate that the trustee should be able to ascertain the rights of the bankrupt,^(u) a law agent is bound to deliver to the trustee all papers in his possession affecting the bankrupt's estate; but he is entitled to a reservation of his lien or right of hypothec;^(x) the result of which is that, provided his claim to a lien be well founded, he has a preference over the other creditors for the amount of his business accounts.^(y) It is quite immaterial what use may be made of the documents, the trustee being apparently still liable, although after considering the matter he should return the documents and decline to interfere with the property to which they relate.^(z) The preference, moreover, seems to extend not merely over that part of the bankrupt estate to which the documents relate, but over the whole estate.^(a) A law agent claiming in a

(t) *Ferguson & Stewart v. Grant*, 8 Feb. 1856, 18 D. 536. See also *Drysdale or Craig v. Howden*, *supra* (s), and opinion of Lord Benholme in *Skinner v. Henderson*, 2 June 1865, 3 Macph. 867.

(u) It has been observed by the Court that a trustee in a sequestration is bound to get the title-deeds of the bankrupt; *Johnstone v. Bell*, 23 Jan. 1823, 2 S. (N. E.) 133.

(x) *Johnstone v. Bell*, *supra* (u); *Paul v. Mathie*, 2 Feb. 1826, 4 S. 420, (N. E. 424); *Skinner v. Henderson*, *supra* (t). In the case of *Dobie v. Scales*, 19 May 1831, 9 S. 609, the creditors of an ancestor, holding heritable bonds with powers of sale, and their agent who held the titles hypothecated, offered to the trustee on the bankrupt estate of the heir apparent to give him either full inspection of the titles or actual delivery of them, on payment or caution for their debts; and the Court held that they were not bound to deliver them on any other condition.

(y) *Renny & Webster v. Myles*, 8 Feb. 1847, 9 D. 619; and cases referred to *infra* (a). See also *Campbell v. Montgomerie*, 2 July 1839, 1 D. 867.

(z) *Renny & Webster v. Myles*, *supra* (y). See also Bell's Com. vol. ii. 113.

(a) *Johnstone v. Bell*, 23 Jan. 1823, 2 S. 144 (N. E. 133); *Paul v.*

sequestration must put a specified value on any lien he may have, and deduct such value from his debt; (*b*) but a nominal value may be put upon it, or it may even be valued at nothing. (*c*) The obligation of the trustee to give effect to a lien, if found to exist, may be competently enforced by an ordinary action against him; (*d*) and it would seem that a trustee receiving documents under reservation of an agent's right of lien is personally liable for failing to make it available out of the estate. (*e*) A trustee may apply by incidental petition to the Court for warrant against a former agent in the sequestration for delivery of the titles and papers of the bankrupt, under reservation, of course, of his hypothec. (*g*)

18. In a process of ranking and sale, the Court may dispense with the production of the title-deeds of the estate under sale, and thus defeat the lien over them of the common debtor's agent. (*h*) But a sale will not be authorised without their production, where it appears that the estate will fetch a higher price if they are produced. (*i*) When their production is required, the agent to whom they are hypothecated is entitled, on delivering them up, to a preference over the fund for the amount of his accounts. (*k*)

19. Under the Companies Act of 1862 (25 and 26 Vict. c. 89, § 115) the solicitor of a company which is being wound up may be compelled to produce documents relating

Production of title-deeds in actions of ranking and sale.

Delivery of documents of a company which is being wound up.

Mathie, 2 Feb. 1826, 4 S. 420 (N. E. 424); *Skinner v. Henderson*, 2 June 1865, 3 Macph. 867.

(*b*) 19 and 20 Vict. c. 79 (Bankruptcy Act) §§ 4 and 59; *Elder v. Thomson, &c.* 12 June 1850, 12 D. 994.

(*c*) *Renny v. Kemp*, 1 July 1841, 3 D. 1134. See also *M'Ewan v. Cleugh*, 7 Dec. 1842, 5 D. 273; *Aitken v. Callender*, 10 June 1848, 10 D. 1269; *Hay v. Durham*, 5 Feb. 1850, 12 D. 676; *Gibson v. Greig*, 17 Dec. 1853, 16 D. 233.

(*d*) *Renny v. Kemp*, *supra* (*c*).

(*e*) *Renny & Webster v. Myles*, 8 Feb. 1847, 9 D. 619.

(*g*) *Paul v. Mathie*, 2 Feb. 1826, 4 S. 420 (N. E. 424).

(*h*) *Findlay v. M'Intosh*, 20 July 1842, 4 D. 1550; affirmed in House of Lords, 10 July 1845, 4 Bell, 361.

(*i*) *Clason v. Jones*, 17 July 1847, 9 D. 1512.

(*k*) *Creditors of Newlands v. Mackenzie*, 9 Feb. 1793, M. 6254; *Hotchkis v. Thomson*, 16 Jan. 1794, M. 6256.

to the company, without prejudice to any lien he may have.^(l)

Validity and
effect of lien
as against
third par-
ties.

20. A law agent is entitled to retain the papers of a client, not only as against the client himself, but also as against third parties claiming through him.^(m) The lien is thus available against the client's representatives, singular successors, creditors, real as well as personal, and the trustee on his sequestrated estate.⁽ⁿ⁾ It seems doubtful whether the law agent of the granter of a *mortis causa* deed is entitled to retain it, after the death of his client, from the beneficiaries under it. In a recent case it was held by the First Division, reversing the judgment of Lord Barcaple, that the assignee of a party who had acquired right to certain heritable property under the undelivered *mortis causa* settlement of his mother, was not entitled to obtain delivery

^(l) In an English case under this section, it was observed by Lord Justice Hatherley that the Act left a discretion on the part of the Judge; but it was a judicial discretion, to be exercised according to the facts of the case, as there might be special grounds for non-production. The section could not be read in any way except as saying that production might be ordered, but must be without prejudice to any lien; though in many cases, of course, this would render the lien valueless; *In re South Essex Estuary & Reclamation Co.*, 24 Feb. 1869, 4 Law Reports, Chancery Appeals, 215. The solicitor of an official liquidator has no lien on the proceedings in the winding-up or other documents relating thereto; *In re Union Cement Co.*, 9 July 1869, 4 Law Reports, Chancery Appeals, 627.

^(m) See opinion of Lord Cowan in *Scott v. Thomson*, 6 Dec. 1854, 17 D. 124; and cases *infra*. The same general principle is recognised by the law of England (Pulling's Law of Attorneys, 5th edition, p. 372; Stokes on Liens of Attorneys, p. 15); but the dissimilarity of the laws of the two countries, especially as to real estate, frequently leads to different results in the application of the principle. The English authorities will be found fully collected and discussed in *Blunden v. Desart*, 2 Dec. 1842, 2 Drury & Warren, 405. A general finding of expenses in favour of a litigant does not carry the expenses of an incidental discussion with a third party's law agent relative to the production of documents over which the latter claims a lien; *Lord Elibank v. Campbell*, 29 Jan. 1834, 12 S. 354.

⁽ⁿ⁾ Bell's Prin. § 1442; *Creditors of Lidderdale v. Naismyth*, 5 July 1749, M. 6248; *Dalrymple v. E. of Selkirk*, 18 July 1751, Elch. Hypothec, No. 17, and 1 Bell's Ill. 465; *Wight v. Kidd*, 27 Nov. 1828, 7 S. 70; *Guthrie v. Ogilvie*, 3 Feb. 1830, 2 Jur. 193; and cases referred to *infra*.

of the deed from her law agent without paying an account which she had incurred to him.(o) This case, however, can scarcely be regarded as decisive of the general question, because the agent had obtained a decree against the son personally for payment of the account due by the mother.

21. It is now quite settled that a law agent is entitled to retain his client's title-deeds against the client's heritable creditors, even although their infetment be prior in date to the commencement of the agent's account or his possession of the title-deeds.(p) This was first held in the case of the *Creditors of Hamilton of Provenhall*,(q) in which the law agent of a bankrupt was found preferable, in virtue of his hypothec, to a creditor under a heritable bond, on which infetment had been taken before the date of the agent's account; and though the decision was not generally approved of at the time,(r) it has ever since been regarded as authoritative. The next case in which the same question arose was reported to the Court by the Lord Ordinary, who stated that had it not been for that previous case, he would have held the reverse; but the Court unanimously followed the precedent of that case, and observed that it had been well decided.(s) In a subsequent case the agent of a party, who had purchased an estate under the real burden of the price, was held, in a competition

Lien over title-deeds effectual as against heritable creditors.

(o) *Paul v. Meikle*, 11 Dec. 1868, 7 Macph. 235. In England a solicitor claiming a lien on a will relating to personal estate may be compelled to deliver it up for the purposes of probate (*Ex parte Law*, 10 Nov. 1834, 2 Adolphus & Ellis, 35); and although the question does not seem to have been actually decided in the case of wills relating solely to real estate, strong opinions have been frequently expressed by English judges that in no case can an attorney or solicitor have a lien over the will of the client; *Georges v. Georges*, 30 Oct. 1811, 18 Vesey, 294; *Lord v. Wormleighton*, 27 July 1822, Jacob, 580; *Balch v. Symes*, 7 Feb. 1823, Turner & Russell, 87.

(p) By the law of England, a solicitor's lien is not available against a prior encumbrancer; *Smith v. Chichester*, 25 May 1842, 2 Drury & Warren, 393; *Blunden v. Desart*, 2 Dec. 1842, 2 Drury & Warren, 405; see also *Marsh v. Bathoe*, 1744, Ridgeway's Chancery Cases, 256.

(q) 9 Aug. 1781, M. 6253.

(r) 2 Bell's Com. 113, n. 7; and 1 Bell's Ill. 463.

(s) *Campbell v. Smith*, 1 Feb. 1817, 19 F. 271.

with the creditor under the reserved burden, entitled to a lien over the title-deeds, including the disposition to his client, although the real burden had been constituted prior to the commencement of the agent's account, and was contained in the very deed which formed his client's title to the property.(t) Some of the judges who decided the case were of opinion that the preference of a law agent was founded on absolute necessity and utility; and all agreed that, although the principle were to be held erroneous, the rule was now fixed. The preference was carried still farther in a later case, in which an agent employed by a disponee and heir apparent, who had been three years in possession, but who subsequently renounced, was held entitled to a lien as against the heritable creditors of the ancestor.(u) Regret has been frequently expressed that these decisions should have so extended the rights of law agents as to deprive the public records of much of their utility; and it has often been observed that the privilege ought not to be extended to any case not included within the principle of existing decisions.(x) But no doubt has ever been cast on the authority of the cases referred to as precedents;(y) so that it must be regarded as quite settled that a law agent's lien or hypothec is effectual against the heritable creditors of a client, whether the creditors' right be created by constitution or reservation. "The grounds of decision in all these cases are that the owner of the estate whose agent insists in this right is the owner also of the deeds, and that the owner's agent retains them lawfully, with the consent and to the exclusion of the right of the heritable creditor. So much is this the case, that it is not unfrequently an arrangement that the deeds

(t) *Campbell & Clason v. Goldie*, 15 Nov. 1822, 2 S. 16 (N. E. 14).

(u) *Cameron v. Burns*, 25 June 1824, 3 S. 176 (N. E. 118).

(x) *Murray v. Scott*, 2 Dec. 1829, 8 S. 161; *Callander v. Laidlaw*, 11 Feb. 1834, 12 S. 417; *Kemp v. Young, &c.*, 13 Feb. 1838, 16 S. 500; 2 Bell's Com. 113; *Renny & Webster v. Myles*, 8 Feb. 1847, 9 D. 619.

(y) See opinion of Lord Chancellor Cranworth in *Gray v. Graham*, 14 Aug. 1855, 2 Macq. 435, and 18 D. (H. L.) 52. See, however, cases referred to *post*, p. 229, in which agents have been held barred *personali exceptione* from claiming a lien against parties lending money to their clients.

are left with the lender or his agent to prevent the preferable right of lien from being created to his exclusion."⁽²⁾ Even, however, where no such arrangement has been entered into, and the title-deeds still remain in the possession of the owner's agent, his lien may be defeated by a heritable creditor with a bond containing the usual powers of sale selling the property over which the security extends, without offering any progress of writs and titles to the purchaser. In one case the heritable creditor was herself the purchaser at a roup by the trustee on the sequestrated estate of the debtor, under articles which bound the purchaser to 'pay the price to the trustee, who was to deliver a progress of writs according to inventory. Nothing was said in the articles of roup as to the titles being hypothecated to the debtor's law agent, and the heritable creditor was not otherwise informed of that circumstance. The price was insufficient to pay the heritable debt. In these somewhat special circumstances, and on the heritable creditor dispensing with the delivery of any progress of writs, and renouncing all claim to rank in the sequestration for any balance of her heritable debt which might remain unpaid, the Court held that she was not bound to pay the account for which the titles were hypothecated.^(a)

22. As has been already stated, inhibition does not prevent a proprietor from subsequently placing his title-deeds in the hands of his law agent so as to hypothecate them.^(b) The lien, however, has been held not to cover the expense of litigation between an inhibiting creditor and the proprietor's agent acting as trustee for his client under a trust-deed for behoof of creditors, to which the inhibiting creditor has not acceded.^(c)

23. A law agent's lien is not available against third parties whose right is paramount or adverse to that of his client.

(a) *Per* Lord Curriehill in *Smith v. Lamont*, 13 May 1858, 20 D. 912. See also opinion of Lord Balgray in *Murray v. Scott*, 2 Dec. 1829, 8 S. 161; *Malcolm v. Carmichael*, 9 March 1854, 16 D. 825; and opinion of Lord Neaves in *Scott v. Thomson*, 6 Dec. 1854, 17 D. 124.

(a) *Grant v. Bain*, 18 Feb. 1840, 2 D. 618.

(b) *Menzies v. Murdoch*, 15 Dec. 1841, 4 D. 257.

(c) *Rattray v. Cruttenden & Co.*, 19 Feb. 1828, 6 S. 568.

client.(d) Thus a superior has been held entitled to have the title-deeds of a vassal produced in a process of recognition, notwithstanding of their being hypothecated to the vassal's agent, in order to prove that the vassal had committed a feudal delinquency sufficient to infer recognition;(e) and, on the same principle, a substitute heir of entail pursuing a declarator of contravention against the heir in possession has been allowed inspection of the title-deeds hypothecated to the defender's agent.(g) A third party is, however, entitled to force production of papers which are subject to a lien, only for the purpose of proving facts, and not for the purpose of using the writs as the title of his author, and consequently his own. Thus, a creditor who had adjudged the estate of a client was held not entitled to demand production of the title-deeds in an action of maills and duties.(h) When documents subject to a lien are recovered under a commission and diligence by the client's adversary for the purpose of proving his case, the client himself cannot make use of them without paying his agent's account.(i)

24. The right of an heir of entail to the title-deeds of

Lien over
title-deeds
not available
against heir
of entail.

(d) Bell's Prin. § 1443. "Though a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it, so also must the solicitors."—*Per* Lord Chancellor Redesdale in *Furlong v. Howard*, 25 July 1804, 2 Schoales & Lefroy's Irish Chancery Cases, 115. See also *Brassington v. Brassington*, 27 May 1823, 1 Simon & Stuart, 455; *Hollis v. Claridge*, 12 May 1813, 4 Taunton, 807; *Hope v. Liddell*, 30 June 1855, 7 De Gex Macnaughten & Gordon, 331; and *In re Union Cement and Brick Co.*, 9 July 1869, 4 Law Reports, Chancery Appeals, 627.

(e) *E. of Sutherland v. Coupar*, 31 Jan. 1738, M. 6247; Sir R. Stewart and Others, 29 Jan. 1742, M. 6248.

(g) *Murray v. Scott*, 2 Dec. 1829, 8 S. 161.

(h) *Dalrymple v. E. of Selkirk*, 18 July 1751, Elch. Hypothec, No. 17, and 1 Bell's Ill. 465.

(i) *Montgomerie v. A. B.*, 1 March 1845, 7 D. 553. It seems that in England when a party claiming by title paramount to that of the client forces the production of papers, the benefit thereby incidentally accruing to parties whose right is derived from the client cannot be taken from them, and the solicitor thus loses the benefit of his lien; *Blunden v. Desart*, 2 Dec. 1842, 2 Drury & War. 405.

the estate being of a limited character, his agent is not entitled to retain them from a succeeding heir, or from a creditor of the entailer adjudging the lands and titles.⁽ⁱ⁾ When an entailed estate has been vested by private Act of Parliament in trustees, for the purpose of being sold and the price applied in paying debts and charges affecting the estate, the surplus to be laid out on land which is to be re-entailed, the titles are not subject to the lien of the agent of the heir so divested.^(k)

25. When several parties have co-extensive or co-existing rights in the same title-deeds or other documents—for example, heirs-portioners, or a liferenter and a fiar—it can scarcely be doubted that the agent of one is not entitled to plead his right of hypothec against the others;^(l) but the point has never been actually decided. The question was, however, raised in a recent case whether a mutual deed could be hypothecated to the agent of one of the parties to it, as against the others. A. had conveyed certain subjects to B., under burden of a ground-annual in favour of C., on which infestment followed in favour of B. and C. for their respective rights. The deed was thereafter sent to B.'s agent, on the footing that he was to put it on record for preservation; but B. having become bankrupt, his agent claimed a lien over it. In these special circumstances the Court held that the agent was not entitled to retain the deed as against A. and C., and ordained him either to return it or place it on record.^(m) In an old case, a law agent having refused to exhibit at the suit of a third party a client's charter, which contained a bond of annuity to the

Is lien available against party whose right is co-extensive with that of client?

(i) *Callander v. Laidlaw*, 11 Feb. 1834, 12 S. 417.

(k) *Scott v. Thomson*, 6 Dec. 1854, 17 D. 124.

(l) See opinions in *Campbell and Clason v. Goldie*, 15 Nov. 1822, 2 S. 16 (N. E. 14); and *Scott v. Thomson*, *supra* (k). See also *Ex parte Nesbitt*, 24 Jan. 1805, 2 Schoales and Lefroy's Irish Chancery Cases, 279; *Molesworth v. Robbins*, 8 May 1845, 2 Jones and La Touche, 358; *Lightfoot v. Keane*, 1836, 1 Meeson & Welsby, 745; and *Pelly v. Wathen*, 30 March 1849, 7 Hare, 361.

(m) *Smith v. Lamont*, 13 May 1858, 20 D. 912.

third party, the Court found his hypothec competent "only against his employer."⁽ⁿ⁾

Discharge
and waiver
of the lien.

26. A law agent's lien is, of course, discharged by payment of his business accounts;^(o) and when their amount is periodically transferred to a current cash account, an entry of a sum on the credit side, sufficient to extinguish the balance then due to the agent, is, in the absence of any evidence of specific appropriation, regarded as a payment of his business accounts up to that date, and consequently as a discharge of his lien for their amount.^(p) An agent who, in consideration of a payment to account, abandons his lien over the title-deeds of part of a client's property, is entitled to retain the titles of the remaining property for the whole unpaid balance of his accounts.^(q) It was, however, held by the Court of Session in one case, where a client who owned two estates had become insolvent and granted a trust-deed for behoof of his creditors, that his agent, having parted with the titles of one estate, could demand from the holder of a security over the other only a proportional share of his account, according to the relative value of the two estates.^(r) But the soundness of this decision has been questioned in the House of Lords.^(s)

Lien generally
expires
with possession
of documents.

27. In the ordinary case, a law agent's hypothec, like all other liens, expires with the loss of possession.^(t) But there are several cases in which an agent is regarded as the legal possessor of documents which have ceased to be in his actual custody.^(u) Thus, a country agent who sends a

(n) *Lady Kirmin v. M'Vicar*, 17 Feb. 1736, Elch. Hypothec, No. 3, and M. 6249.

(o) In a recent case the Court held that an agent was not bound to deliver title-deeds to the heir-at-law of a client, until the heir had expedite a service to his ancestor; *Smith v. Jackson*, 8 Dec. 1871, 10 Macph. 211.

(p) *Campbell v. Montgomerie*, 2 July 1839, 1 D. 1147. See also *Lang v. Brown*, 2 Dec. 1859, 22 D. 113.

(q) *Gray v. Graham*, 14 Aug. 1855, 2 Macq. 435, and 18 D. (H. L.) 52, reversing the judgment of the Court of Session on this point, 21 May 1851, 13 D. 963.

(r) *Clark v. Morrison*, 29 Nov. 1837, 16 S. 133.

(s) *Gray v. Graham*, *supra* (q).

(t) *Bell's Com.* vol. ii. 112; *Bell's Prin.* § 1440.

(u) It has been held in England that if a solicitor parts with the pos-

client's papers to his town agent,(x) and an agent who lends papers to another agent employed by his client, still retain their right of lien.(y) When title-deeds are borrowed on an obligation to return them on demand, the agent lending them is entitled to have them restored to him without discussing the validity of his claim to a lien over them,(z) and the agent borrowing them can hold and use them only for the purpose of inspection.(a) The mere producing of a client's papers in a process does not seem to be such a loss of possession as to put an end to a lien.(b) If an agent parts with documents, but re-acquires possession of them before his employment has ceased, his lien revives, but the case is different if the relation of agent and client has terminated before the second acquisition.(c)

29. A law agent may waive his right of retention either by express agreement or by implication.(d) It has been frequently held in Scotland that it does not amount to a waiver of his right for an agent to take a bill or promissory-note for

Implied
waiver of
lien.

session of papers by his own act, though by mistake, his lien is at an end; but it is otherwise if the papers did not get lawfully out of his possession (*Dicas v. Stockley*, 1836, 7 Carrington & Payne, 587); and that a solicitor does not lose his lien for costs due to himself solely upon documents which, having come into his own possession, are afterwards continued in the possession of himself and his partners; *Pelly v. Wathen*, 30 March 1849, 18 Law Journal, Chancery, 281.

(x) Bell's Com. vol. ii. 112; *Walker v. Phin*, 8 June 1831, 9 S. 691.

(y) *Renny v. Rutherford and Kemp*, 27 Feb. 1840, 2 D. 676, and 1 July 1841, 3 D. 1134; *Watson v. Lyon*, 12 June 1855, 7 De Gex Macnaughten & Gordon, 298.

(z) *Crawford v. Hodge*, 15 Nov. 1831, 10 S. 11. See also *Duncan v. Fea*, 22 Jan. 1824, 2 S. 636 (N. E. 539).

(a) *Murray v. Sinclair*, 3 June 1847, 9 D. 594 and 1194.

(b) Bell's Com. vol. ii. 112; *Finlay v. Syme*, 23 Jan. 1773, M. 6250; *Callmon v. Bell*, 28 Nov. 1793, F.C., and M. 6255.

(c) See *ante*, p. 210, and opinion of Lord Fullerton in *Renny & Webster v. Myles*, 8 Feb. 1847, 9 D. 619; *Levy v. Barnard*, 3 Feb. 1818, 2 Moore, 34.

(d) *M'Creadie v. Reid*, 16 Feb. 1822, 1 S. 330 (N. E. 307); *Smith v. Lamont*, 13 May 1858, 20 D. 912; 2 Bell's Com. 114; *Taylor v. Gorman*, 15 June 1844, 7 Irish Equity Reports, 259; *Fitzgerald v. Bermingham*, 26 April 1842, 1 Connor & Lawson, 405.

the amount of his account,(e) or even a bond containing a reservation of his hypothec.(g) Mr Bell, however, having regard to the law of England on this subject, says in his Commentaries, that "if time be given, as by a bond or bill at a distant date, it will require some strong indication of an intention to preserve the lien, in order to keep it in force; either an express reservation, or at least a plain purpose of accommodating the client, without weakening the security, by enabling the agent to raise money at market, and to forbear from insisting on immediate payment."(h) But he does not state this opinion quite so strongly in his Principles;(i) and probably the only rule that can be safely laid down is, that the taking of a security will not exclude an agent's lien, unless the whole circumstances show that the arrangement was intended to be restrictive of his claim to the security, and to supersede the general rule of law.(k)

(e) Creditors of Hamilton of Provenhall, 9 Aug. 1781, M. 6253; *Linning v. Douglas*, 27 June 1821, 1 S. 90 (N. E. 89); *Skinner v. Paterson*, 31 May 1823, 2 S. 354 (N. E. 312); *Gairdner v. Milne & Co.*, 13 Feb. 1858, 20 D. 565. See also *Ayton v. Colville*, 23 Nov. 1705, M. 6247.

(g) *Linning v. Douglas*, *supra* (e).

(h) Bell's Com. vol. ii. 114.

(i) Bell's Prin. §§ 1418 and 1444.

(k) Thomson on Bills (Dove Wilson's edition), p. 98; *Gairdner v. Milne & Co.*, *supra* (e). See also *Little v. Wightman*, 13 Jan. 1829, 7 S. 224. In none of the English cases has it been positively decided that the mere taking of a bill operates a discharge of an attorney's lien. In the case of *Cowell v. Simpson* (28 July 1809, 16 Ves. 275), the lien was held to be lost by a solicitor's taking a promissory-note payable with interest three years after date. Lord Eldon there expressed an opinion that an attorney who takes a security abandons his lien. But this doctrine was questioned by Lord Ellenborough in *Stevenson v. Blakelock* (28 May 1813, 1 Maule & Selwyn, 535), in which it was held that an attorney had not lost his lien by taking bills which had been dishonoured, or retired by the attorney. But in a later case (*Chase v. Westmore*, 21 May 1816, 5 Maule & Selwyn, 180), Lord Ellenborough appears to have acquiesced in the law laid down in *Cowell v. Simpson*; and Lord Eldon re-asserted his opinion in *Balch v. Symes* (7 Feb. 1823, 1 Turner and Russell, 87). In one case it was held that a solicitor who had taken a bond for the amount of his costs had lost his lien on papers in his hands, though the bond had become due and remained unpaid; *Brydges*

29. A law agent who, in preparing a heritable security, acts for both the borrower and the lender, is barred *personali exceptione* from afterwards claiming his right to retain the title-deeds of the property, as against the lender, for the amount of accounts due by the borrower, whether incurred before or after the loan, if he fails to inform the lender at the time the security is granted that he intends to claim retention for the accounts then due, and does not obtain the lender's consent to the proceedings for which subsequent accounts are incurred. (l) Even when the agent of the borrower has not acted for the lender also, he may be met by a similar exception, if he has conducted himself in such a manner as to lead the lender to suppose that he has waived his right. (m)

Cases in which agents are barred *personali exceptione* from claiming lien.

v. *Brydges*, 18 April 1818, 4 Hare, 135, *note*. It was more recently held in an Irish case (*Brownlow v. Keatinge*, 15 Feb. 1840, 2 Haig's Irish Equity Reports, 243) that a solicitor lost his lien by taking a bond for his costs with interest, the interest having been regularly received for a number of years. In deciding that case the Master of the Rolls observed that he would have had much difficulty, if the solicitor had merely taken a security for the amount of his costs and nothing more.

(l) *Wilson v. Lumsdaine*, 29 June 1837, 15 S. 1211; *Allan v. Sawers*, 3 June 1842, 4 D. 1356; *Paterson v. Currie*, 3 July 1846, 8 D. 1005; *Gray v. Graham*, 21 May 1851, 13 D. 963, and 14 Aug. 1855, 2 Macq. 435, and 18 D. (H. L.) 52; *M'Laren on Wills and Succession*, ii. 119.

(m) *Inglis v. Moncrieff*, 7 Feb. 1851, 13 D. 622. See also *Clark v. Morrison*, 29 Nov. 1837, 16 S. 133; and *Hicks v. Keate*, 9 Nov. 1839, 3 English Jurist, 1024.

CHAPTER XVI.

THE TRIENNIAL PRESCRIPTION, AS APPLICABLE
TO LAW AGENTS' ACCOUNTS.

Triennial
prescription
applicable
to business
accounts.

1. It has long been settled that the triennial prescription or limitation introduced by the statute 1579, c. 83, is applicable to the business accounts of law agents, so that, if not pursued for within three years from their close, the constitution and the subsistence of the debt can be proved only by the writ or oath of the client or his representative. (a) As the statute does not affect the merits of the claim, but only the remedy competent to the creditor, it has been held, in accordance with principles of international law, to apply to the case of a foreign creditor instituting an action in Scotland; (b) and thus an English attorney suing in our courts for payment of his bill may be met with the plea of the triennial prescription, (c) although his claim is not barred by the Statute of Limitations till the expiry of six years. (d)

What items
prescribe.

2. The statute has been held to include not only remuneration for professional business, but also annual factor

(a) *Somerville v. Muirhead's Exrs.*, 16 Dec. 1675, M. 11,087; *Dallas v. Mackenzie*, 21 Feb. 1695, 4 Br. Sup., 271; *Mason v. Earl of Aberdeen*, 29 Nov. 1709, M. 11,094; *M'Adam v. Fogo*, 22 Dec. 1786, M. 6252; *Kerr v. Mags. of Kirkwall*, 15 June 1827, 5 S. 802 (N. E. 742); *Wallace v. M'Kessock*, 4 March 1829, 7 S. 542; *Ersk. iii.* 7. 17; 1 *Bell's Com.* 331.

(b) *Dickson on Evidence*, § 526 *et seq.*; *Story's Conflict of Laws*, §§ 556 and 576.

(c) *Campbell v. Stein*, 23 Nov. 1813, 17 F.C. 456, affirmed 5 June 1818, 6 Dow, 116; *Webster v. M'Clelland*, 2 July 1852, 14 D. 932; *Deans v. Steele*, 24 Dec. 1853, 16 D. 317; *Richardson, &c. v. Merry*, 19 June 1863, 1 Macph. 940.

(d) *Darby & Bosanquet on Statutes of Limitation*, p. 25.

fees,(e) and commission on cash transactions.(g) Cash advances, however, even when mixed up in one account with business charges which have prescribed, do not fall under the triennial prescription,(h) with the exception of such ordinary disbursements as fall within the usual province of a law agent to make.(i) It is often difficult to say what is an ordinary disbursement; but it has been decided that the following items fall under that category, viz., payments to witnesses, fees to counsel, fees of court, and travelling expenses on a journey connected with professional employment.(k) But it was held in one case in which a law agent had been employed as a political agent, that his travelling expenses did not prescribe.(l)

3. While it is quite settled that the triennial prescription does not apply to claims of a mandatory or *negotiorum gestor* for repayment of advances,(m) it is only in very exceptional circumstances that a law agent's claim for remuneration will be held not to fall under the prescription on the ground that it has arisen *ex mandato*. Indeed, there is only one instance in which effect was given to such a plea. A Scotch attorney in Exchequer having been repeatedly employed by the

Claim to remuneration arising *ex mandato*.

(e) *Smith's Children v. Earl of Winton*, 3 Dec. 1714, M. 11,096, and 4062; *Grubb v. Porteous*, 3 March 1835, 13 S. 603; *Dickson*, §§ 482 and 484. It has, however, been observed by Mr More that this point would require to be reconsidered; *Notes to Stair*, p. 275.

(g) *Scott v. Gregory's Trs.*, 24 Feb. 1832, 10 S. 375; *Todd's Trs. v. Melville*, 5 Feb. 1836, 14 S. 432.

(h) *Kerr v. Mags. of Kirkwall*, 15 June 1827, 5 S. 802 (N. E. 742); *Moncreiff v. Lady Denham*, 26 May 1836, 14 S. 830, *Dickson*, § 484.

(i) *Richardson v. Merry*, 19 June 1863, 1 Macph. 940.

(k) *Richardson v. Merry*, *supra* (i). Reference may also be made on this point to the cases relating to claims of hypothec (*ante*, p. 213), "the right of hypothec in security of the claim, and the liability of the claim to prescription, being exactly commensurate, both applying to the usual advances in the performance of the professional duties as law agents, and neither of them to cash advances of a different kind."—*Per* Lord Curriehill in *Richardson v. Merry*, *supra*.

(l) *Moncreiff v. Lady Denham*, *supra* (h).

(m) *Dickson*, § 487; *Drummond v. Stewart*, 19 Feb. 1740, M. 11,103; *Saddler v. M'Lean*, 18 Nov. 1794, M. 11,119; *Smith v. Mitchell's Tr.* 19 June 1829, 7 S. 771, and cases *supra*.

general body of lowland Scotch distillers to attend to their interests in regard to various legislative measures affecting their trade, and having accordingly proceeded at different times to London, and been otherwise much occupied in the performance of the business intrusted to him, the Court held, in three separate actions, that his claim for remuneration did not fall under the triennial prescription, because it was not properly a writer's account, but arose *ex mandato* for business not falling within the scope of his ordinary professional employment. (n) These decisions were treated as authoritative in a subsequent case; (o) but it may be inferred from *obiter dicta* in more recent cases that, in order to prevent such a claim falling under the prescription, it must be clearly beyond the scope of a law agent's professional employment; and it may perhaps be necessary in addition that the employment be out of Scotland. (p) It is quite settled that the triennial prescription applies to professional accounts of London solicitors, with reference to parliamentary business. (q),

Prescription runs only after the close of an account.

4. In the case of an account, the term of three years "does not run on the several articles as separate debts, but on the whole account considered as one debt; and it begins to run, not while the account is current, but only when it is closed. (r) The close of the account is therefore an important point. And, 1. If the account be continuous, or without any

(n) *Walker v. Paterson*, 13 Nov. 1812; *Walker v. Simpson*, 9 June 1813 (both noted in *Blackadder v. Milne*, 4 March 1851, 13 D. 820); and *Walker v. M'Nair*, 19 June 1832, 10 S. 672.

(o) *Blackadder v. Milne*, *supra* (n), in which it was held that the triennial prescription did not apply to the charges of an engineer employed to give professional evidence against a private bill before Parliament.

(p) *Barr v. Edinburgh and Glasgow Railway Co.*, 17 June 1864, 2 Macph. 1250; *White v. Caledonian Railway Co.*, 15 Feb. 1868, 6 Macph. 415.

(q) *Deans v. Steele*, 24 Dec. 1853, 16 D. 317; *Richardson v. Merry*, 19 June 1863, 1 Macph. 940.

(r) *Ersk. iii.* 7. 17; *Dickson*, § 490; *A. v. B.* 16 Dec. 1675, M. 11,086; *Somerville v. Muirhead's Exrs.*, 16 Dec. 1675, M. 11,087; *Wright's Executrix v. Dickson*, 14 Feb. 1753, M. 11,106; *White v. Currie*, 1 Dec. 1829, 8 S. 154.

interval of three years, the date of the last furnishing, act done, or article not being a mere accessory article of interest, is the close of the account.(s) 2. An interruption or interval of three years closes the account of what precedes it. 3. The death of the debtor closes an account,"(t) and a new account is commenced by furnishings to, or employment by, his representatives.(u)

5. The date of the last item being the *terminus a quo*,^{The last entry must be made in bona fide.} prescription may be barred by a single entry continuing the currency of the account to a period within three years from the raising of an action.(x) But in order that it may have this effect, there must be no doubt as to the *bona fide* character of such an entry.(y) Thus, in one case the Court sustained the plea of prescription, holding that two entries at the close of the account, which did not appear in a law agent's books, had been inserted merely for the purpose of evading prescription;(z) and in another case, where the last item was for drawing a pleading, which, however, bore to be drawn by the client, who was then a procurator, it was held that the pursuer could not redargue this statement, or claim a fee for drawing the paper; and the plea of prescription was accordingly sustained.(a) When the last items of an account have been paid, they must, of course, be struck out of the account,

(s) Ersk. iii. 7. 17; Dickson, § 490; Mason v. E. of Aberdeen, 29 Nov. 1709, M. 11,094; Torrance v. Bryson, 5 Dec. 1840, 3 D. 186. See also Whyte v. Currie, 1 Dec. 1829, 8 S. 154.

(t) Bell's Com. vol. i. 331-2.

(u) Dickson, § 492; Wilson v. Tours, 12 Feb. 1680, M. 11,089; Lyon v. Mitchell, 14 Dec. 1819, Hume, 481; Kennedy v. M'Dougal, 23 June 1741, M. 11,104; Ormiston v. Hamilton, 11 Nov. 1709, M. 11,093, affirmed 28 March 1712, Robertson's App. 32; Wilson v. Rutherford, 7 Feb. 1826, 4 S. 428 (N. E. 433); Campbell v. Jolly, 20 May 1823, 3 S. 39 (N. E. 25). The contrary is erroneously stated by Erskine (Inst. iii. 7. 17, Prin. iii. 7. 6) on the authority of a very old case, Graham v. Stanebyres, 26 Feb. 1670, M. 11,086. See also Napier on Prescription, p. 772.

(x) Mason v. E. of Aberdeen, 29 Nov. 1709, M. 11,094; Moffat v. Marshall, 25 Jan. 1825, 3 S. 475 (N. E. 329). See also Gordon v. Sir J. Innes, 16 May 1826, 4 S. 577 (N. E. 585).

(y) Dickson, § 490.

(z) Stewart v. Scott, 28 Feb. 1844, 6 D. 889.

(a) Dick v. Richardson, 2 July 1841, 3 D. 1141.

and cannot be added to prior items remaining unpaid, for the purpose of bringing down the account to within the prescriptive period.(b)

Continuity
of accounts
for separate
pieces of
business.

6. When a law agent is employed by the same party to manage several separate pieces of business, his whole accounts are regarded as a *unum quid*, so that prescription does not begin to run till the close of the whole.(c) In a recent case, an agent, who sued for payment of two accounts separated by an interval of three years, having been met with the plea of prescription, the Court held him entitled to show that the accounts were continuous by proving employment during the intervening period, the summons having contained a general reservation of other claims not mentioned in it, and a supplementary action having been afterwards brought for the accounts not included in the original summons.(d)

Continuity
of accounts
due by a
country to
an Edin-
burgh agent
for several
clients.

7. Prior to the date of the passing of the Law Agents Act (5th August 1873), a country agent employing an Edinburgh agent on behalf of a client was liable conjunctly and severally with his client in payment of the Edinburgh agent's account; and this joint liability gave rise to a farther extension of the principle of the continuity of accounts incurred in one course of employment. For, in a question of prescription between a country and an Edinburgh agent, all the accounts incurred by the former to the latter on behalf of his various clients were regarded as a single account.(e) The Law Agents Act, however, provides that "a law agent authorised and acting for a client whom he discloses shall incur no liability to any other law agent employed by him, except such as he shall expressly undertake in writing."(g) Where a country agent expressly under-

(b) *Beck v. Learmonth*, 30 Nov. 1831, 10 S. 81.

(c) *Elder v. Hamilton*, 15 May 1833, 11 S. 591; *Dickson*, § 491; *Bell's Prin.* § 631.

(d) *Wotherspoon v. Henderson's Trs.*, 10 July 1868, 6 Macph. 1052. See also *Fisher v. Ure*, 5 March 1836, 14 S. 660.

(e) *Fisher v. Ure*, 5 March 1836, 14 S. 660; *Wotherspoon v. Henderson's Trs.*, 10 July 1868, 6 Macph. 1052.

(g) 36 and 37 Vict. c. 63, § 21.

takes in writing to be responsible for several clients, there seems to be no reason why the various accounts so incurred should not still be regarded as one continuous account.^(h) But even prior to the passing of the Law Agents Act, an Edinburgh agent's claim against each individual client was apparently not preserved from prescription by being contained in the general account incurred by a country agent to his Edinburgh agent on behalf of several clients.⁽ⁱ⁾

8. The question has been several times raised, whether an account incurred to an individual agent can, in a question of prescription, be regarded as continued by an account to a company of which he becomes a partner, or *vice versa*. In the first case in which the question arose, two accounts had been incurred to an agent individually, with less than three years between them, and a third to a company of which he was a member for eighteen intermediate months. It was held by the Lord Ordinary (Cuninghame) that the company account was not continued by the second individual account, and was therefore prescribed; but that the interval between the accounts due to the agent individually was too short to deprive them of the character of a continuous account.^(k) The account due to the firm being very small, the agent acquiesced in the interlocutor; but the defender having reclaimed against it, in so far as it repelled the plea of prescription as to the account incurred before the partnership, the Court adhered. The agent not having reclaimed, the Court had no occasion to review the judgment of the Lord Ordinary in regard to the continuity of the account due to the company with the accounts due to the individual agent. But Lord Pre-

Continuity
of partner-
ship ac-
counts.

(h) On the principle that prescription does not apply to an action of relief among *correi debendi*, it would probably be held that a country agent who has paid an account for which he was liable along with his client to an Edinburgh agent cannot be met with the plea of prescription in an action against his client for repayment of the amount; *Bland v. Short*, 11 Jan. 1825, 3 S. 419 (N. E. 294); *Dickson on Evidence*, § 488.

(i) *Dickson on Evidence*, § 491; *Fisher v. Ure*, *supra* (e).

(k) *Torrance v. Bryson*, 5 Dec. 1840, 3 D. 186.

sident Hope, referring to a well-known legal firm, thought that the continuity of their business accounts would not be interrupted by a change in the junior partners.^(l) In a subsequent case, an account having been incurred partly to a company of law agents, and partly to one of the individual partners, to whom the debts due to the company had been assigned, and who carried on the business after the dissolution of the co-partnery, and the clients having in their correspondence dealt with the company account as an account due to the individual agent, the Court, without deciding the general question, held that there was enough in the special circumstances of the case from which to infer that the account sued for was continuous, and that prescription was excluded.^(m) But in a recent case it was held by the Lord Ordinary (Barcaple), whose judgment was affirmed by the Second Division of the Court, that an account incurred to a legal firm consisting of two members, and an account incurred after the dissolution of the co-partnery to one of them, to whom the company accounts had been assigned, could not be regarded as one continuous account.⁽ⁿ⁾ It was, however, observed that not every change in the constitution of a company would break the continuity of its current accounts.^(o)

(l) 16 F. 145.

(m) *Barker v. Kippen*, 29 May 1841, 3 D. 965. See also *Stewart v. Scott*, 28 Feb. 1844, 6 D. 889, in which Lord Medwyn observed *obiter*, "I am not inclined to hold that if an agent assumes a partner, and is continued in the employment of his former client, performing the same species of business as before, the account is not to be viewed as a continuous account, merely because the latter portion may be due to him in partnership with another."

(n) *Wotherspoon v. Henderson's Trs.*, 10 July 1868, 6 Macph. 1052. In this case accounts incurred before the formation of the partnership were held to be continued by an account incurred, during the subsistence of the partnership, to the pursuer individually, and not to the firm.

(o) *Lord Barcaple*—"The obvious policy and intention of the statute was to compel creditors to raise action for their debts within a reasonable time after they become fully due, and it is expressed in terms ample for that purpose. By the complete dissolution of a company to which an account has been incurred, the debt for which action is to be raised

9. When there are unsettled accounts and mutual claims between agent and client, and a general accounting ensues, the triennial prescription cannot be pleaded as to particular items or accounts so as to cut down one side of the general account, while the other is left untouched. (p)

Prescription not pleadable in a general accounting.

is complete, and there is nothing to prevent the application of the statute as in the case of an account still current. In disposing of this question, the Lord Ordinary does not mean to decide any point which is not expressly included in the case. In particular, the judgment which he now pronounces does not imply any opinion as to the effect, in this question of prescription, of mere changes upon a firm by the retirement or assumption of partners. Such a case may present considerations with which at present he has no occasion to deal."

Lord Justice-Clerk Patton—"I can figure cases of such employment as that the continuity of an account should not be held to be affected by a change of copartnery. A case of employment of a firm, of changes in a firm not known to the client, the introduction or withdrawal of parties having a mere interest in the firm, would present a case for decision different in its nature, and which might probably be viewed differently. In this case there is a palpable change in the firm, a substantial alteration in the contracting parties, an avowed, known, and recognised introduction of altered responsibility. A copartnery constitutes a new person, and though there may be special cases where, from the nature of the contract, or the dealings of parties, the effect of a change may not be held to operate so as to rear up prescription, I do not think it is so here. There was a change in the creditor, and that a known change."

Lord Neaves—"I am of opinion that in order to found a plea of continuity in the account against which prescription is pleaded, there must be an identity of the creditor throughout. . . . The formation of a company by the assumption of a *bona fide* partner makes a new *persona*. . . . The continuity is in like manner broken when the partnership, once formed, is dissolved by the retirement of one of the partners. I do not say that there may not be specialties which may alter the general rule, as for instance if the client has been communicated with and informed that the account is to be treated as one account; but apart from specialties, and assuming the change to be known and *bona fide*, I cannot doubt that the retirement or assumption of a partner breaks the continuity of an account."

(p) *Smith's Children v. E. of Winton*, 3 Dec. 1714, M. 11,096; *Good v. Smith*, 30 June 1779, M. 6816; *Brunton v. Angus*, 3 Dec. 1822, 2 S. 61 (N. E. 54); *Boyes v. Gray*, 30 June 1829, 7 S. 815; *Hall v. Arnot*, 19 Dec. 1837, 16 S. 263; *Murray v. Wright*, 16 March 1870, 8 Macph. 722; *Dickson on Evidence*, § 502.

But this equitable rule does not extend to the case of an agent raising an action of count and reckoning in order to recover payment of items omitted in accounts which have been virtually settled.(q)

What "pursuit" bars prescription.

10. The statute introducing the triennial prescription provides that all actions for the debts to which it refers "be pursued within three years, otherwise the creditor shall have no action except he either prove by writ or oath of his party." What amounts to pursuit is not declared by the statute, and the decisions on the subject are not altogether consistent.(r) But notwithstanding some *dicta* to the contrary,(s) it must be regarded as settled that the pursuit required by the statute need not be by raising the very action in which decree for the debt is sought: it is sufficient that the creditor has within the three years taken competent judicial or *quasi* judicial proceedings for the recovery of the debt, even although such proceedings should not have resulted in an effective decerniture.(t) It is not necessary that there be a direct action at the instance of the creditor; it is enough if he has lodged a claim for the debt in a multiplepoinding,(u) or in a ranking and sale,(v) or in a reference,(x) or has pleaded the debt by way of compensation to a counter claim.(y) It is expressly provided by the

(q) *Todd's Trs. v. Melville*, 5 Feb. 1836, 14 S. 432, and 11 F. 361.

(r) *Dickson on Evidence*, § 497 *et seq.*; *Napier on Prescription*, p. 716 *et seq.*

(s) *Per* Lord Glenlee in *McLaren v. Buik*, 27 Feb. 1829, 7 S. 483; Lord Justice-Clerk Hope in *Cochran v. Prentice & Co.*, 24 Nov. 1841, 4 D. 76, and in *Alcock v. Easson*, 20 Dec. 1842, 5 D. 356; Lord Kinloch in *Gobbi v. Lazzaroni*, 19 March 1859, 21 D. 801; *Napier on Prescription*, p. 718.

(t) *Dickson*, § 497; *Dunn v. Lamb*, 14 June 1854, 16 D. 944; *Eddie v. Monklands Railway Co.*, 5 July 1855, 17 D. 1041; *Bell's Prin.*, § 630.

(u) *Dickson*, § 498; *Eddie v. Monklands Railway Co.* *supra* (t); *Lindsay v. E. of Buchan*, 17 Feb. 1854, 16 D. 600.

(v) *Dickson, supra*; *Douglas, Heron & Co. v. Richardson*, 26 Nov. 1784, M. 11,127.

(x) *Dunn v. Lamb, supra* (t). See also *Bell on Arbitration*, p. 303. A general submission is insufficient; *Garden v. Rigg*, 26 Nov. 1743, M. 11,274.

(y) *Dickson*, § 435; *Sloan v. Birtwhistle*, 1 June 1827, 5 S. 742 (N. E.

Bankruptcy Act that "the presenting of, or concurring in, a petition for sequestration, or the lodging a claim in the hands of the trustee, or the sheriff, or preses at any meeting of creditors, shall interrupt prescription of the debt of the creditor so petitioning, concurring, or claiming, and in regard to such debt shall bar the effect of any statute of limitations in England or Ireland, or other Her Majesty's Dominions, and although this sequestration shall be recalled, such interruption or bar shall notwithstanding be effectual." (z) The question has been raised, but not decided, whether proceedings in a *cessio* have the same effect. (a) On the other hand, the triennial prescription is not barred by raising an action which is either incompetent (b) or is afterwards abandoned; (c) nor by a mere reservation of a claim in judicial proceedings. (d) The production of an account and oath of verity in a process of cognition and sale has been held insufficient, on the ground that on such proceedings no decree

692). See also *Lindsay v. E. of Buchan*, *supra* (u); and *Ross v. Robertson*, 20 July 1855, 17 D. 1144.

(z) 19 and 20 Vict. c. 79, § 109. Under a similar provision in the former Sequestration Act, it was held that the production of a bill did not save it from prescription as against other acceptors than the bankrupt; *Crawford's Trustees v. Haig*, 25 May 1827, 5 S. 705 (N. E. 658). In *M'Callum v. Christie*, 25 Jan. 1833, 11 S. 321, opinions were expressed by the Lord Ordinary (Corehouse) and Lord Gillies that a law agent with a hypothec over the title-deeds of the bankrupt could vindicate his claim against the effect of prescription by claiming in the sequestration, though he stated that he did not desire to be ranked on the sequestrated estate. This, however, seems opposed to *dicta* in the more recent cases of *Eddie v. Monklands Railway Co.*, 5 July 1855, 17 D. 1041, and *Gobbi v. Lazzaroni*, 19 March 1859, 21 D. 801; and it must be remembered that the agent of a bankrupt is bound to deliver, under reservation of his hypothec, all papers affecting the bankrupt estate to the trustee in the sequestration. See Chapter XV, on Hypothec or Lien, *ante*, p. 204.

(a) *Thomas v. Stiven*, 20 May 1868, 6 Macph. 777. In the circumstances of the case, the trustee was held barred from pleading prescription. See also *Stuart v. Douglas*, 20 Feb. 1823, 2 S. 226 (N. E. 200).

(b) *M'Laren v. Buik*, 27 Feb. 1829, 7 S. 483, 780; *Cochran v. Prentice & Co.*, 24 Nov. 1841, 4 D. 76.

(c) *Gobbi v. Lazzaroni*, 19 March 1859, 21 D. 801.

(d) *Eddie v. Monklands Railway Co.*, 5 July 1855, 17 D. 1041.

could follow in favour of the creditor.(e) The fact that a law agent has a hypothec over the papers of his clients does not prevent prescription running against his accounts;(g) and even when he has judicially claimed retention of papers until payment of an account which has not been produced, the prescription of that account is not interrupted.(h)

Effect of
expiry of
prescriptive
period.

11. If an account is not pursued for within three years from its close, the claim prescribes, whether it is made by way of action or as a defence of compensation.(i) In computing the prescriptive period, no deduction is allowed in consequence of the creditor's minority(k) or the debtor's absence from this country.(l) The three years having expired without any pursuit on the part of the creditor, the statute restricts his proof to the writ or oath of his party.

Mode of
pleading
prescription
as a defence.

12. In pleading prescription, it is not necessary to aver payment or extinction of the debt, a denial of the claim being contained in the statutory defence;(m) and a defence inconsistent with the plea of prescription may be alternatively postponed.(n) But the defender's admissions on record are quite as binding upon him as his writ or oath.(o)

(e) *Ferrier v. E. of Errol*, 9 July 1811, 16 F.C. 325.

(g) *Mason v. E. of Aberdeen*, 29 Nov. 1709, M. 11,094; *Foggo v. M'Adam*, 22 Dec. 1780, M. 6252, and 2 Hailes, 875. It has been held in England that the lien of an attorney remains effectual although his claim may be barred by the Statute of Limitations; Bell's Prin. § 630, and cases there referred to, and *In re Broomhead*, 9 June 1847, 16 Law Journal, Queen's Bench, 355.

(h) *Couper's Exrs. v. Ogilvy*, 26 Nov. 1753, M. 11,107. See also Chapter XV., on Hypothec, pp. 216-7.

(i) Dickson, § 501.

(k) *Brown v. Brodie*, 26 Jan. 1709, M. 11,150; More's Notes, p. 276; Bell's Prin. § 633.

(l) *Macghie v. Tinkler*, 17 Dec. 1776, M. 11,112, and Prescription Appx. No. 3; Bell's Prin. § 633.

(m) *Alcock v. Easson*, 20 Dec. 1842, 5 D. 356; Napier on Prescription, p. 731.

(n) Dickson, § 408; Napier, p. 726.

(o) *Miller v. Baird*, 7 Dec. 1819, Hume, 480; *Maule v. Sommers*, 21 June 1822, 1 S. 514 (N. E. 475); *Ritchie v. Little*, 15 Jan. 1836, 14 S. 216; *Morison v. Robertson's Exr.* 28 May 1863, 1 Macph. 822; Dickson, §§ 407 and 603; 1 Bell's Com. 333; Napier on Prescription, p. 800.

They cannot, however, be used for the purpose of eking out statements in his writ or oath ;(*p*) and they must always be taken along with their intrinsic qualifications.(*q*) Thus, a party who was sued for payment of an account incurred in defending an action, having admitted that the defence was carried on in his name, and that he had contributed information at various times, but having added that he had intimated to the agent employed that he did not intend to defend the action, whereupon the latter had agreed to conduct the process for certain trustees, who were the parties truly interested, and of whom the agent was one, the Court held that this qualified admission did not prove the constitution of the debt.(*r*) On the other hand, as an allegation of compensation is regarded as extrinsic, it does not qualify an admission of resting owing.(*s*)

13. When prescription is pleaded against an agent's account, and there are no judicial admissions on which he can found, he must have recourse to the writ or oath of the defender, in order to prove both the fact of his employment and the subsistence of the debt.(*t*) But it is not necessary that both should be proved by the same means, that is to say, he may prove the employment by oath, and the subsistence of the debt by writ, or *vice versa*.(*u*)

Prescribed account must be proved by writ or oath of defender.

14. The writ of the debtor does not require to be either probative or holograph,(*x*) or to specify the particular account or the amount of the debt.(*y*) If the debtor denies that a letter

Kind of writ required.

(*p*) *Young v. Pollock*, 25 May 1832, 10 S. 570 ; *Webster v. M'Clelland*, 2 July 1852, 14 D. 932 ; *Kennard & Sons v. Wright*, 15 June 1865, 3 Macph. 946.

(*q*) *Alcock v. Easson*, 20 Dec. 1842, 5 D. 356 ; *Dickson*, § 409.

(*r*) *Scott v. Donaldson*, 8 Dec. 1831, 10 S. 107.

(*s*) *Mitchell v. Ferrier*, 23 Nov. 1842, 5 D. 169.

(*t*) 1 Bell's Com. 333 ; *Douglas & Ferguson v. M'Kerrel*, 8 Dec. 1814, Hume, 474 ; *Milligon v. Skinner*, 10 June 1831, 9 S. 720. As to referring to the oath of one person as representing or binding another, see *Dickson*, § 1570 *et seq.*

(*u*) *Deans v. Steele*, 24 Dec. 1853, 16 D. 317.

(*x*) *Dickson*, § 504 ; *Macandrew v. Hunter*, 13 June 1851, 13 D. 1111 ; 1 Bell's Com. 333.

(*y*) *Laurie*, 19 Dec. 1799, Hume, 461 ; *Davidson v. Hay*, 29 May 1806, Hume, 460 ; *Dickson*, § 504.

acknowledging in general terms an account to be due, refers to the account sued for, it is competent for the creditor to prove that it does so, by producing the letter to which the debtor's letter was an answer.^(z) When the constitution and subsistence of the debt have been proved by writ, it is competent to prove the precise amount *prout de jure*;^(a) and the business accounts of law agents are, of course, subject to taxation in common form, notwithstanding of the constitution and subsistence of the debt having been proved by the client's writ or oath.^(b) It is not necessary that the debtor's writ should contain an express admission that the debt has been contracted and is still due, if that is the fair inference from it.^(c) Thus, where a party signed, along with his country agent, a letter to an Edinburgh agent, authorising him to advocate a process, and stating that the case was transmitted on the same terms as those upon which it had been formerly sent for the Edinburgh agent's advice, those terms having been that the country agent was not to incur any personal responsibility for the expenses, the Court held the constitution of the debt to the Edinburgh agent to be proved as against the party by his subscription of the country agent's letter, which did not imply that he was to be free from liability for the account incurred on his employment, and that resting owing was proved by his letter, dated after three years, which, referring to the demand for payment, and reminding the agent of the way in which the employment had been undertaken, concluded, "I do not hold myself liable, and decline to recognise any claim by you against me," that statement being held as equivalent to an admission of non-payment.^(d) A letter from a country agent authorising business

(z) *Stevenson v. Kyle*, 31 May 1849, 11 D. 1086. See also *Fiske v. Walpole*, 19 July 1860, 22 D. 1488.

(a) *Stevenson v. Kyle*, 13 Feb. 1850, 12 D. 673; *Fife v. Innes*, 17 Nov. 1860, 23 D. 30.

(b) *Macandrew v. Hunter*, 13 June 1851, 13 D. 1111; *Webster v. M'Clland*, 2 July 1852, 14 D. 932.

(c) *Dickson*, § 509; *Fiske v. Walpole*, 19 July 1860, 22 D. 1488.

(d) *Macandrew v. Hunter*, 13 June 1851, 13 D. 1111. See also *Webster v. M'Clland*, 2 July 1852, 14 D. 932.

to be done, but without evidence of authority, general or special, from the client to the country agent, is not sufficient to elide prescription as against the client.(e) Formerly, when it was proved by the writ of a country agent that he had employed an Edinburgh agent, no effect was given to his statement on record that he did so on the understanding that he should not be personally liable ;(g) though such a qualification was regarded as intrinsic if contained in his writ or oath.(h) But it is now declared by the Law Agents Act that "a law agent authorised and acting for a client whom he discloses shall incur no liability to any other law agent employed by him, except such as he shall expressly undertake in writing."(i)

15. In order to prove the subsistence of a prescribed debt, the debtor's writ must be dated after the expiry of the three years.(j) If it does not bear any date, it cannot, therefore, prove resting owing ;(k) but apparently the date may be proved by intrinsic evidence to have been after the three years.(l) Payments to account, and payments of interest, are held to prove resting owing, provided they are instructed by the debtor's writ after the expiry of the prescriptive period.(m)

Date of writ.

16. As the statute requires the debt to be proved by the debtor's writ, the mere fact that his books do not contain an entry of payment, is insufficient to elide prescription.(n) This rule has been applied to the case of the books of a trustee in a sequestration, where they proved the employment of a law agent, but contained no entry, showing his account to

Absence of entry of payment not equivalent to writ.

(e) *Wallace v. M'Kessock*, 4 March 1829, 7 S. 542.

(g) *Clyne v. Snody*, 2 July 1830, 8 S. 1004.

(h) *Dickson*, §§ 506 and 507 ; *Knox v. M'Caul*, 8 Nov. 1861, 24 D. 16.

(i) 36 and 37 Vict. c. 63, § 21.

(j) *Dickson*, § 508 ; 1 Bell's Com. 332 ; *Gobbi v. Lazzaroni*, 19 March 1859, 21 D. 801 ; *Macpherson v. Williamson*, 20 March 1865, 3 Macph. 727.

(k) *M'Laren v. Buik*, 20 June 1829, 7 S. 780.

(l) *Watson v. Johnstone*, 14 Feb. 1846, 18 Jurist, 598 ; affirmed on another point, 6 Bell's App. 245.

(m) *Dickson*, § 512.

(n) *Dickson*, § 510.

have been paid.(o) But where the debtor was a burgh, it was held in two cases that a law agent's account was proved to be still due by the absence of any entry of payment in the accounts of the treasurer.(p) The soundness of this distinction has, however, been called in question.(q)

Proof by
debtor's
oath.

17. When examined on a reference to oath, the defender is not entitled to shelter himself under a general denial of the constitution or subsistence of the debt, but must answer all pertinent questions; and the Court will give effect to the denial only when consistent with the answers to the special questions.(r) Each case depends, of course, upon its own circumstances; but the general principle is quite settled that if a party admits facts sufficient to establish liability for an agent's account, no effect can be given to his denial of the obligation, as that amounts merely to an erroneous opinion in law. Thus, where a party deposed that she believed the business comprehended in an account sued for to have been performed by the pursuer, and that she had obtained the benefit of it in the titles made up by her mother, whom she represented as one of several heirs-portioners, that she had no reason to think that any part of the account was paid by her parents, and that she had not paid it herself, but that in these circumstances she did not believe the account to be resting-owing, the Court held the oath to be affirmative of the reference.(s) In another case, a party having admitted on oath that he had been cited in an action jointly with another defender, to whom he gave the service copy and information

(o) *Ellis v. White*, 12 July 1849, 11 D. 1347. The trustee having died, and no successor having been appointed, the action was against the creditors, who were formerly liable to the law agent employed by the trustee; see *ante*, p. 150.

(p) *Muirhead v. Town of Haddington*, 30 June 1748, Kilkerran's report, M. 2507; *Leslie v. Mags. of Brechin*, 15 Nov. 1808, 15 F.C. 2.

(q) *Dickson*, § 511; *Ellis v. White*, *supra* (o).

(r) *Bell's Com.* vol. i. 333; *Dickson*, §§ 515 and 1616. As to the distinction between extrinsic and intrinsic qualification, see *Dickson*, § 1632 *et seq.* Compensation is regarded as extrinsic; *Ersk.* iv. 2. 11.

(s) *Napier v. Balfour*, 2 June 1835, 13 S. 853. See also *Grubb v. Porteous*, 3 March 1835, 13 S. 603. See however *Cullen v. Smeal*, *infra* (e) as to the oath of the debtor's representative.

as to a claim on which to found a plea of compensation, which were handed to an agent who acted for both, that he had had interviews with the agent on the subject, and had carried away for perusal the process containing papers in his name, and that he did not recollect of having ever told the agent not to look to him for payment; the Court held that he was liable for the agent's account, although he stated that he did not think himself indebted for the amount.(t) It is, however, to be observed that when a party, on a reference to his oath, denies that the business charged for was done on his employment, the contrary will not be readily inferred.(u) The fact that he has benefited by an agent's services is of course insufficient;(x) and in one case, where a party deponed that he had accompanied his sons to the office of a law agent in order to give some explanations as to business of theirs, though one of his objects was to secure, if possible, advances which he had made to them, the oath was held to be negative of the reference.(y) In a recent case, in which the defender deponed that he had employed an agent to defend an action, but only on the footing that he should incur no liability either for outlay or professional remuneration, and that the agent relied entirely on getting payment of his account, in the event of his being successful, from the opposite party, the Court held the deposition to be negative of the reference, as it proved a contract totally subversive of the claim sued for.(z) Where a defender deponed that the pursuers were employed, through the intervention of a messenger-at-arms, to conduct a pro-

(t) *Grant v. Wishart*, 17 Jan. 1845, 7 D. 274.

(u) See Chapter VI. on Evidence of Law Agents' Appointment or Retainer, *ante* p. 86 *et seq.*

(x) *Douglas & Ferguson v. M'Kerrell*, 8 Dec. 1814, Hume, 474. This was an action against a committee of the creditors of a bankrupt for payment of an account of business, relating to meetings and the execution of a trust-deed in their favour. The defenders having deponed that the pursuers were the agents of the bankrupt, and had never been employed by them, the constitution of the debt was held not proved.

(y) *Gray v. Turner*, 8 Dec. 1857, 20 D. 246.

(z) *Knox v. M'Caul*, 8 Nov. 1861, 24 D. 16. See also *Morrison v. Robertson's Exr.*, 28 May 1863, 1 Macph. 822; and *ante*, p. 90.

cess for him in a sheriff-court at some distance from his residence, and that, the messenger having rendered the pursuers' accounts and given him a charge on a decree for the amount, he had paid him the sum, the oath was held not to prove resting-owing.(a) Where a defender depones that he believes an account to be paid because he has given money to his factor for the purpose of paying it, the oath will be held to be negative of a reference as to the subsistence of the debt.(b) But in one case, in which a party deponed that he believed the account sued for to have been paid by his factor, and was certain from having settled accounts with him that it had been paid, it was found competent to refer to these accounts; and as they did not afford any evidence of payment, the oath was held to be affirmative.(c)

Oath of
debtor's
heir.

18. It was formerly held that where the original debtor died during the currency of the three years, and his representatives admitted that they had not paid the account sued for, the triennial prescription did not apply.(d) But this construction of the statute was overruled by the judgment of the whole Court in the case of *Cullen v. Smeal*; (e) so that it is now "definitely settled that where the creditor in an account sues the heir of the debtor after three years from the close of the account, he must prove by the heir's writ or oath both the constitution and the subsistence of the debt, whether the original debtor died during the currency of the three years or after they had terminated."(g)

(a) *Canpbell v. Shearer*, 16 May 1833, 11 S. 600.

(b) *Mackay v. Ure*, 13 Nov. 1847, 11 D. 982.

(c) *Cooper v. Hamilton*, 20 Feb. 1824, 2 S. 728 (N. E. 609); affirmed 14 March 1826, 2 W. & S. 59.

(d) *Bell's Com.* vol. i. 334; *Bell's Prin.* § 632; *Napier*, pp. 735 and 798.

(e) 12 July 1853, 15 D. 868.

(g) *Dickson*, § 522; *Guthrie's Bell's Prin.* § 632; *Nicolson's Erskine*, p. 869, *note*.

CHAPTER XVII.

DISABILITIES OF LAW AGENTS.

1. The relation of agent and client not only involves all the duties and obligations implied in the relation of principal and agent, but it also subjects professional men to various disabilities arising from the peculiar position of trust and confidentiality which they occupy towards their clients. In this aspect a law agent may be best described as a trustee who is entitled to remuneration according to a fixed tariff,^(a) but who is not allowed to make any additional gain or profit at the expense of his clients.^(b)

Disabilities arising from fiduciary character of law agents.

2. By an old Scotch statute, still in force, it is enacted "That in time cumming it sall not be leisum to onie Lordes of the Session, ordinar or extraordinar, Advocates, Clerkes, Writters, their servandes, or ony uther member of the Colledge of Justice, or ony inferiour judgements within the Realme, their Deputes, Clerkes, or Advocates, directly or indirectly, be themselves, or ony utheris in their names to their behove or utility: To buy ony landes, teinds, rowmes, or possessions, quhilkis ar depend and in controversie or question betwixt ony parties, or hes bene dependand and not as zit decided: Quhilks gif they or ony of them do and contraveens the premisses: The saids Lordes of Session, Advocates, Clerkes, Writters, their servandes, or ony uther member of the Colledge of Justice, or ony inferiour judgements within this Realme, their Deputes, Clerkes, and Advocates, sall amit

Statute 1594, cap. 220, against the purchase of depending pleas.

(a) As to deviations from the fixed tariff, see *ante*, p. 123.

(b) *Tyrrell v. Bank of London*, 27 Feb. 1862, 10 Clark's House of Lords Cases, 26.

and tme their office, pleas, and all priviledges and immunities, bruiked or that may be bruiked by them be virtue thereof." (c)

How the
statute is
construed.

3. The statute appears to extend to procurators in the inferior courts; but there is no positive decision to that effect. (d) Although mention is made merely of lands, teinds, rowmes, or possessions, yet assignations of moveables or of any other debateable rights are held to be prohibited *ob paritatem rationis*. (e) But as it is only the purchase of processes actually depending in court that is prohibited, there is nothing to prevent an agent from taking an assignation of a claim on which action has not yet been raised, (g) or even of an action in which the summons has been executed but not called in court, (h) or of a final decree. (i) It is doubtful whether a cause which has been submitted to a judicial referee is a depending plea in the sense of the statute. (k) The prohibition does not extend to gratuitous conveyances, (l) nor apparently to conveyances *ex causa necessaria*, as for relief of cautionary obligations or payment of debts. (m) In one case, an agent, who before raising an action took an assignation in security of his expenses and of advances to be made

(c) 1594, c. 216 (c. 220 in the small edition of the statutes). In England there is no disqualification peculiar to counsel and attorneys in regard to the purchase of property pending litigation; Paterson's Compendium of English and Scotch Law, p. 163. But both professional and non-professional men are subject to the restrictions imposed by the laws relating to maintenance and champerty. See *ante*, p. 129.

(d) Mackenzie's Observations on the Acts of Parliament, p. 290; Forbes v. Bean, 30 July 1774, 5 Br. Sup. 530; Johnston v. Rome, 1 Feb. 1831, 9 S. 364.

(e) Mackenzie's Observations on the Acts of Parliament, p. 289.

(g) Mowat v. M'Lellan, 6 July 1625, M. 9496. See also *Tyson v. Jackson*, 22 Nov. 1861, 30 Beavan, 384.

(h) Richardson v. Sinclair, 30 July 1635, M. 9496.

(i) Ruthven v. Weir, 23 June 1680, M. 9499. See also *Collace v. Elphinston*, 22 March 1626, 1 Br. Sup. 31.

(k) Forbes v. Bean, 30 July 1774, 5 Br. Sup. 530.

(l) Mackenzie's Observations on the Acts of Parliament, p. 289; Hume v. Hume, 30 July 1678, M. 9498; Purves v. Keith, 20 Dec. 1683, M. 9500, 3 Br. Sup. 486.

(m) Purves v. Keith, *supra*; Southesk v. Eleis, 1676, 3 Br. Sup. 105.

by him in alimentering his client, was held not to have violated the Act.(n)

Although an agent who contravenes the statute incurs the penalty of deprivation, the right acquired by him is not thereby annulled.(o)

Right acquired in contravention not annulled.

4. A law agent ought not to request or accept a gift or gratuity from a client, at least until the confidential connection between them has been completely dissolved. It has never been decided in Scotland that gifts made during the subsistence of the relation of agent and client are intrinsically and absolutely null; but there is no case in which the Court have sustained, while in two cases they have set aside, such gifts. The circumstances of the first of these cases were as follows:—An agent, who had unexpectedly recovered more than £1000 of a debt due to a client, wrote to his client to know what he would allow him for having recovered so large a part of the debt, and incurred so much risk, trouble and expense. In point of fact the agent had incurred no risk; and his business account, which was not transmitted to the client, amounted to only £18. The client, in ignorance of these circumstances, agreed to discharge the agent on receiving £500, and to allow him to keep the remainder. But the Court of Session held that the discharge was not binding, and that the client's heir was entitled to recover payment of the balance of the debt, under deduction of the agent's business account.(p) In affirming this judgment in the House of Lords, Lord Gifford, however, observed that if the client had acted with the full knowledge of his situation, he could not have required back his bounty, but that it was the agent's duty to disclose the real situation before desiring his client

Gift or gratuity from client.

(n) *Forbes v. Bean*, *supra*. See also *Fraser v. Dunbar*, 6 June 1839, 1 D. 882; and *Walker v. Wedderspoon*, 23 March 1843, 2 Bell's App. 57.

(o) Mackenzie's Observations on the Acts of Parliament, p. 289; *Stair*, i. 14. 2; *Colt v. Cunningham*, and *Cunningham v. Maxwell*, 5 June 1611, M. 9495; *Purves v. Keith*, *supra*; *Home v. Home*, 15 Dec. 1713, M. 9502; *Drysdale v. Nairne*, 28 Jan. 1835, 13 S. 348. See, however, the opinion of Lord Cringletie in *Johnston v. Rome*, 1 Feb. 1831, 9 S. 364.

(p) *Long v. Taylor*, 8 June 1821, 1 S. 58 (N. E. 59).

to make him a gift.(q) In the second of the cases referred to, a needy and embarrassed client had, in order to obtain an immediate advance of money, entered into a minute of agreement with his law agent during the subsistence of the connection between them, whereby he agreed to make a gift of £1000, as a reward for the extra trouble which the agent had had in the management of his business, and the zealous manner in which he had conducted it. The Court held the agreement to be null "in the circumstances of the case;" but decided opinions were expressed by Lord Wood and Lord Cowan that a gift by a client to his law agent is absolutely null, irrespective of the particular circumstances in which it may be granted.(r)

Law of
England as
to gifts to
solicitors.

5. These opinions were chiefly founded on a review of some previous English cases on the subject; but the more recent decisions of the Court of Chancery seem to establish a less rigorous principle. Thus, Vice-Chancellor Stuart observed in 1861—"The law of this Court as to gifts by a client to his solicitor, I think, is perfectly established. The principle is, that the relation of solicitor and client is one of such high confidence on the part of the client that the solicitor is considered to have an amount of influence over the mind and action of his client, which, in the eye of this Court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift; but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client. That relation is only looked at as creating the influence; and, as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of that relation is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity."(s) Again,

(q) 28 May 1824, 2 S. App. 233.

(r) *Anstruther v. Wilkie*, 31 Jan. 1856, 18 D. 405.

(s) *In re Holmes*, 21 Nov. 1861, 3 Giffard, 345.

in 1863, it was observed by the same judge, that a gift by a client to his solicitor "is subject to be set aside, unless there be clear evidence of the removal of that pressure upon the client, which the Court always presumes where the relation of solicitor and client is proved to subsist."^(t) In another case, it was observed by the Master of the Rolls (Sir John Romilly)—"I fully concur in the argument and observation, that a solicitor does not stand in any different situation from any other person, and that there is nothing *ipso facto* in the relation of solicitor and client which makes it impossible for a solicitor to receive a gift from his client. But when the gift has been fully established, the question then arises whether undue influence has been exercised; and then the fact of the relation of solicitor and client is an ingredient in estimating the extent of the actual or probable influence exercised over the donor. . . . I am of opinion that, in all these cases, you must not take into account the evidence of the recipient himself; the gift must be established by separate and independent evidence, and if there were separate and independent evidence here, I should uphold the gift."^(u) These opinions, it may be observed, are in conformity with the elaborate judgment delivered in 1834 by Lord Chancellor Brougham in the leading case of *Hunter v. Atkins*.^(x) And there is one English case, decided in 1854, in which the Lords Justices, reversing the judgment of Vice-Chancellor Stuart, sustained a gift to a solicitor of a promissory-note for £1000, made by a client in his lifetime, and confirmed by his will.^(y)

(t) *O'Brien v. Lewis*, 30 Jan. 1863, 32 Law Journal, Chancery, 572.

(u) *Walker v. Smith*, 26 Feb. 1861, 29 Beavan, 394. In this case, a lady having (as was alleged) made a voluntary gift to her solicitor of £500 East India Stock, which was transferred into his name under a power of attorney executed by her in favour of another person two days previously, and the transaction having been kept secret, and no other solicitor employed in the transaction, it was held that the gift could not be sustained.

(x) *Hunter v. Atkins*, 24 Feb. 1834, 3 Mylne & Keen, 135; Tudor's Leading Cases in Equity, 4th edition, p. 591.

(y) *Hindson v. Weatherill*, 30 May 1854, 23 Law Journal, Chancery, 820.

Agent preparing will in his own favour.

6. By the civil law a person who drew a will for another was absolutely disqualified from taking any benefit under it.(z) This doctrine, however, has been adopted into the law of Scotland only to the extent of invalidating the notarial execution of a deed where the notary by whom it bears to be signed takes any benefit under it, or is named trustee or executor.(a) In neither England nor Scotland is a will or legacy invalidated by the mere fact that the party intended to be benefited acted as the solicitor or law agent of the testator in preparing the deed ;(b) but the conduct of a professional man in such circumstances is viewed with the greatest suspicion. " In many, perhaps in most cases, the presumption against the deed created by the mere circumstance that the party favoured is the law agent who prepared it, will supply the want of all other element of fraudulent impetration. It never can be the proper course in any ordinary circumstances for a law agent so to act, and it will always be upon him to show that the making of the settlement in his favour was the free and uninfluenced act of the testator, entertained and carried through with an entire knowledge of its effect."(c) The English cases on this subject (the circumstances of which need not be detailed, as

(z) D. xxxiv. 8, 1.

(a) *Ferrie v. Ferrie's Trs.*, 23 Jan. 1863, 1 Macph. 291.

(b) *Baker v. Batt*, 16 May 1838, 2 Moore's Privy Council Reports, 317; *Barry v. Butlin*, 8 Dec. 1838, 2 Moore's Privy Council Reports, 480; *Hindson v. Weatherhill*, 30 May 1854, 5 De Gex, Macnaughten & Gordon, 301; *Grieve v. Cunningham*, 17 Dec. 1869, 8 Macph. 317.

(c) *Per* Lord Barcaple and Lord President Inglis, in *Grieve v. Cunningham*, 17 Dec. 1869, 8 Macph. 317 In this case, the circumstances of which were as follows, the will was sustained by the Court :—The testatrix was an old lady, whose nearest relative was a cousin, to whom she was not particularly attached. She had a strong friendly regard for her law agent, and for three or four years before her death she expressed her intention of leaving him the bulk of her property. This she ultimately did, the agent preparing the deed. The witnesses to its execution were satisfied that the will expressed the true and deliberate intention of the testatrix. See also *Clark v. Spence*, 16 July 1824, 3 Mur. 459 and 477; *Hawarden v. Dunlop*, 31 May 1861, 23 D. 923; and the English cases of *Barry v. Butlin*, *Hindson v. Weatherill*, and *Walker v. Smith*, *supra*, in which legacies to attorneys were sustained.

they involve peculiarities of English law) farther establish the general principle, that a solicitor will be precluded from taking any benefit under a will prepared by himself, where he has not afforded his client every information regarding the nature and effect of its provisions. (d)

7. As long as a law agent acts for a party, he ought not to enter into any bargains or transactions with him; for, on account of the fiduciary nature of the relation of agent and client, such bargains are regarded by the laws of both England and Scotland as contrary to public policy, and may be set aside at any time within the prescriptive period. (e) The general principles established by the decisions of the courts in both countries are briefly these:—that a law agent who is not acting as the legal adviser of a party *in hac re*, is not disqualified from transacting with him, (g) being only bound at most to show that he gave fair value and withheld no information which he himself possessed; (h) but that, though the relation of agent and client may have been dissolved, the disability continues so long as the reasons on which it is founded, viz., the inequality necessarily arising from a client's dependence on his legal adviser, and the presumed exercise of undue influence, continue to operate; (i) that transactions entered into during the subsistence of the relation of agent and client are not absolutely null; (k) unless

Bargains
and trans-
actions be-
tween agent
and client.

(d) *Paine v. Hall*, 25 Feb. 1812, 18 Vesey, 475; *Balch v. Symes*, 7 Feb. 1823, Turner & Russell, 87; *Bulkley v. Wilford*, 1 July 1834, 2 Clark & Finnelly, 102; *Nanney v. Williams*, 9 June 1856, 22 Beavan, 452; *Corley v. Stafford*, 28 May 1857, 1 De Gex & Jones, 238; *Segrave v. Kirwan*, Tudor's Leading Cases in Equity, 4th edition, p. 588.

(e) *Aberdeen Railway Co. v. Blaikie*, 20 July 1854, 1 Macq. 461. As to agreements in regard to the amount of remuneration, see *ante*, p. 124.

(g) *Cane v. Allen*, 16 May 1814, 2 Dow, 289; *Austin v. Chambers*, 15 Aug. 1838, 6 Clark & Finnelly, 1; *Harris v. Robertson*, 16 Feb. 1864, 2 Macph. 664. See also M'Laren on Wills and Succession, vol. ii., p. 353.

(h) *Edwards v. Meyrick*, 29 July 1842, 12 Law Journal, Chancery, 52.

(i) *Carter v. Palmer*, 8 March 1842, 8 Clark & Finnelly, 657; *Gibbs v. Daniel*, 3 May 1862, 4 Giffard, 1; See also *Ex parte Lacey*, 5 Feb. 1802, 6 Vesey, 625.

(k) *Hotchkis & Tytler v. Dickson*, 19 July 1820, 2 Bligh's App. 303, where the House of Lords sustained a compromise of a doubtful claim

the agent has concealed the fact that he was the contracting party; (*l*) that such transactions cannot be impeached by third parties; (*m*) that they are reducible at the instance of the client or his representatives, unless the claim is barred by prescription or *mora* and taciturnity; (*n*) that they will be set aside if there has been the slightest impropriety in the agent's conduct, or the least inadequacy in the amount of consideration or cause of granting; (*o*) that the *onus* of proving the fairness of the transaction lies on the agent; (*p*) and that he must prove, by other evidence than the deed constituting or embodying the transaction in question, the actual receipt by his client of the money, in consideration of which the deed bears to have been granted. (*q*)

Agent may
take secu-
rity from
client.

8. The general rule, that a law agent is not entitled to deal with a client, does not preclude him from taking security, real or personal, for the amount of his business accounts and cash advances. (*r*) He may even take security for future

between a party and his legal adviser, in respect it had been effected with equal knowledge of the facts, and without any improper or fraudulent inducement. See also *Cane v. Allen*, *supra*; *Champion v. Rigby*, 18 March 1839, 9 Law Journal, Chancery, 211; and *Hunter v. Atkins*, 24 Feb. 1834, 3 Mylne & Keen, 113.

(*l*) *Murphy v. O'Shea*, 3 June 1845, 2 Jones & La Touche, 422; *Lewis v. Hillman*, 25 March 1852, 3 Clark, 607; *Gourlay's Trs. v. Kerr*, 6 Dec. 1856, 19 D. 135, and 6 June 1857, 19 D. 789. See also *Anderson v. Stewart*, 16 Dec. 1814, 18 F.C. 108.

(*m*) *Aberdein v. Stratton's Trs.*, 29 March 1867, 5 Macph. 726; *Pattison v. Roy Blunt, &c.*, 28 Nov. 1845, 18 Jur. 88; *Elias v. Black*, 9 July 1856, 18 D. 1225; *Knight v. Bower*, 1 July 1857, 23 Beavan, 609.

(*n*) *Champion v. Rigby*, 18 March 1839, 9 Law Journal, Chancery, 211; *Charter v. Trevelyan*, 5 Sept. 1844, 11 Clark & Finnelly, 714.

(*o*) *Savery v. King*, 9 May 1856, 5 Clark, 627; *Gresley v. Mousley*, 17 Jan. 1862, 31 Law Journal, Chancery, 537.

(*p*) *Carsborne v. Barsham*, 26 June 1839, 2 Beavan, 76; *Champion v. Rigby*, 18 March 1839, 9 Law Journal, Chancery, 211; *Molony v. Kernan*, 13 Jan. 1842, 2 Drury & Warren, 31; *Holman v. Loynes*, 25 Jan. 1854, 23 Law Journal, Chancery, 529; *Anstruther v. Wilkie*, 31 Jan. 1856, 18 D. 405; *Spencer v. Topham*, 21 July 1856, 22 Beavan, 573; *Harris v. Robertson*, 16 Feb. 1864, 2 Macph. 664.

(*q*) *Walker's Exrs. v. Law's Trs.*, 14 Nov. 1833, 12 S. 44, 9 F. 32; *Gresley v. Mousley*, 17 Jan. 1862, 31 Law Journal, Chancery, 537.

(*r*) *Walker's Exrs. v. Law's Trs.*, 14 Nov. 1833, 12 S. 44; *Hiles v.*

debts.(s) But in all cases the security will be effectual only to the extent to which the client is ultimately found to be justly addebted.(t) At any time that a client is not bankrupt, but is master of his own affairs, he may hypothecate his title-deeds or other papers by simply handing them over to his agent, and thus create a valid security for the amount of business accounts incurred by him.(u)

9. Even a purchase by a law agent of the property of a client is not absolutely null,(v) unless it has been carried through in name of a third party without disclosing the fact of the agent being the true purchaser;(x) but it may be reduced if the price is inadequate or the transaction is otherwise improper.(y) In such circumstances, the conveyance

Purchase of
client's pro-
perty.

Moore, 15 June 1848, 17 Law Journal, Chancery, 385; *Johnson v. Fesemeyer*, 21 July 1858, 3 De Gex & Jones, 13; *Pearson v. Benson*, 25 Jan. 1860, 28 Beavan, 598. As to taking a bill from an insolvent client in order to secure a preference, see *M'Ewen v. Doig*, 30 May 1828, 6 S. 889.

(s) *Forbes v. Bean*, 30 July 1774, 5 Br. Sup. 530; *Fraser v. Dunbar*, 6 June 1839, 1 D. 882; *Walker v. Wedderspoon*, 23 March 1843, 2 Bell's App. 57; *Hawarden v. Dunlop*, 31 May 1861, 23 D. 923; As to the mode in which a heritable security for a future debt may be constituted, see Bell's Lectures on Conveyancing, p. 1078. In England it was formerly illegal for attorneys and solicitors to take security for future costs; but they may now do so, under 33 and 34 Vict. c. 28, § 16.

(t) Cases *supra*. See also *Berry v. Anderson*, 13 June 1821, 1 S. 66, affirmed 2 S. App. 213.

(u) See Chapter XV. *ante*, p. 208.

(v) *Douglas v. Dalrymple*, 26 Jan. 1770, 2 Pat. App. 187. *Per* Lord Chancellor Loughborough in *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Pat. App. 378; *Gibson v. Jeyes*, 9 July 1801, 6 Vesey, 206; *Montesquieu v. Sandys*, 11 Nov. 1811, 18 Vesey, 301; *Champion v. Rigby*, 18 March 1839, 9 Law Journal, Chancery, 211.

(x) *Woodhouse v. Meredith*, 1 March 1820, 1 Jacob & Walker, 204; *Lewis v. Hillman*, 25 March 1852, 3 Clark, 607; *Gourlay's Trs. v. Kerr*, 6 Dec. 1856, 19 D. 135, and 6 June 1857, 19 D. 789. See also *Brookman v. Rothschild*, 16 July 1829, 3 Simon, 153; *Gillett v. Peppercorne*, 27 July 1840, 3 Beavan, 78; *Bank of Bengal v. Macleod*, 6 July 1849, 7 Moore, Privy Council, 35; *Charter v. Trevelyan*, 5 Sept. 1844, 11 Clark & Finnelly, 714; *Popham v. Exham*, 31 May 1860, 10 Irish Chancery Reports, 440.

(y) *Gresley v. Mousley*, 17 Jan. 1862, 31 Law Journal, Chancery, 537; *York Buildings Co. v. Mackenzie*, *supra*.

can stand only as a security for the amount of the purchase money.(z) In one case, law agents who had been instructed to sell certain shares were held liable in damages to their client for having themselves purchased the shares without communicating with him.(a)

Purchases
at public
sales.

10. The disability of law agents in regard to purchases from their clients is not confined to voluntary or private transactions, but extends to the case of a purchase at a judicial sale, or at a public auction. In the leading case, of *York Buildings Co. v. Mackenzie*,(b) the common agent employed in an action of ranking and sale had purchased the estate at a judicial sale carried on under his directions, and remained in possession for eleven years thereafter, when an action of reduction was raised by the creditors. The House of Lords, reversing the judgment of the Court of Session, reduced the sale, and ordered the agent to refund all the rents and profits which he had drawn, without prejudice to his title to reclaim the original price, money expended by him in permanent improvements, and interest thereof. This decision has been followed by a great number of analogous cases, fairly establishing the general principle that a purchase by a trustee for sale (that is, a person exposing for sale property not his own) is illegal, and may be set aside at the suit of any party interested in obtaining the highest possible price.(c) A law agent who has been employed to conduct a public sale is thus absolutely disqualified from becoming a purchaser;(d) and probably a similar disqualification will

(z) *Walker's Exrs. v. Law's Trs.*, 14 Nov. 1833, 12 S. 44; *Sanderson v. Glass*, 11 May 1742, 2 Atkyns, 296; *Wood v. Downes*, 2 July 1811, 18 Vesey, 120; *King v. Savery*, 25 Feb. 1853, 1 Smale & Giffard, 271; *Pearson v. Benson*, 25 Jan. 1860, 28 Beavan, 598; *Douglas v. Culverwell*, 1 March 1862, 31 Law Journal, Chancery, 543.

(a) *Gourlay's Trs. v. Kerr*, 6 Dec. 1856, 19 D. 135, and 6 June 1857, 19 D. 789.

(b) 13 May 1795, 3 Pat. App. 378. See also 1 Macq. 481, foot-note; *M'Laren on Wills and Succession*, ii. 347; and *Menzies v. Menzies*, 21 June and 30 July 1712, 4 Br. Sup. 899.

(c) *M'Laren on Wills and Succession*, vol. ii. p. 346; *Lewin on Trusts*, 5th edition, p. 359.

(d) *Gillies v. M'Lachlan's Reps.*, 11 Feb. 1846, 8 D. 487; *Thorburn v.*

attach to an agent who, though not engaged in the actual management of the sale, has intervened on behalf of parties interested in it, so as to render it his duty to assist in obtaining the highest possible price.(e) In one case, however, an accountant, who had been employed to examine and to report upon the affairs of a bankrupt estate, was held not to be thereby disqualified from purchasing at a public roup debts due to the estate;(g) and it has been held by the House of Lords, affirming the judgment of the Court of Session, that it is not a valid objection to a sale of part of an entailed estate for redemption of the land-tax, that the purchase has been made by the advocate who subscribed the petition to the Court for authority to sell.(h)

11. The general principle, that a law agent is not entitled to make any gain or profit at the expense of a client, is applicable to transactions between agents and third parties, as well as to those between agents and clients.(i) Thus, an agent or factor who purchases property with the funds, or by means of the credit, of a client or constituent, is bound to make over the property to his employer, or to communi-

Agent not
entitled to
profit at
client's
expense.

Martin, 8 July 1853, 15 D. 845; *Gourlay's Tra. v. Kerr*, 6 Dec. 1856, 19 D. 135, and 6 June 1857, 19 D. 789; *Whitcomb v. Minchin*, 4 July 1820, 5 Maddock, 91; *Sidney v. Ranger*, 10 June 1841, 12 Simon, 118; *Atkins v. Dalmege*, 10 July 1847, 12 Irish Equity Reports, 1; *In re Bloy's Trust*, 10 Nov. 1849, 1 Macnaughten & Gordon, 448; *Salmon v. Cutts*, 5 Dec. 1850, 4 De Gex & Smale, 125; *Denton v. Donner*, 16 July 1856, 23 Beavan, 285; *Popham v. Exham*, 31 May 1860, 10 Irish Chancery Reports, 440; *In re Romayne's Estate*, 22 Jan. 1863, 13 Irish Chancery Reports, 444.

(e) Tudor's Leading Cases in Equity, 4th edition, p. 159. In a recent English case, where property judicially sold by a mortgagee was purchased by a solicitor whose name appeared in the particulars of sale as one of several from whom information could be got, and who acted for creditors of the mortgagee, but had never been consulted about the sale, the purchase was sustained by Sir G. M. Giffard, L. J. (reversing the decision of Lord Romilly, the Master of the Rolls); *Guest v. Smythe*, 3 May 1870, 5 Law Reports, Chancery Appeals, 551. But this decision does not seem to have met with general approval. See Tudor's Leading Cases, p. 161.

(g) *Smith v. Robertson & Jeffrey*, 10 Feb. 1826, 4 S. 442 (N. E. 448). See, however, *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell's App. 374.

(h) *E. of Wemyss v. Montgomery*, 25 Feb. 1824, 2 S. App. 1.

(i) *Hobday v. Peters*, 27 April 1860, 28 Beavan, 349.

cate any benefit thence arising.(k) Similarly, an agent employed to purchase a property for a client is not entitled to make any arrangement with the seller, whereby he may make a gain to himself at his client's expense, and any such gain must be repaid to the client.(l) Again, an agent or factor cannot purchase for his own behoof any debt or claim against his employer,(m) or compensate the latter's claims against him by obtaining an assignation of counter claims;(n) and he is bound to communicate any eases which he may obtain from creditors.(o) An agent or factor, however, is not bound to communicate contingent benefits arising from his employment. Thus, where a person who had been employed by his brother in India to manage a small landed estate in this country, and to invest in heritable security any sums remitted to him, bought up the land-tax on the estate, and the constituent on being informed did not object, it was held that the factor, on succeeding to the estate as heir to his brother, was not liable to the latter's executors for the money so invested.(p)

Agents now
competent
witnesses
for their
clients.

12. Law agents have always been regarded by the law of Scotland as competent witnesses *against* their clients, except in regard to confidential communications;(q) but they were formerly inadmissible as witnesses *for* their clients in all but a few exceptional cases.(r) The law on

(k) *Gillies v. M'Lachlan's Reps.*, 11 Feb. 1846, 8 D. 487.

(l) *Tyrrell v. Bank of London*, 27 Feb. 1862, 31 Law Journal, Chancery, 369, 10 Clark's House of Lord's Cases, 26.

(m) *Murray v. Murray*, 16 June 1710, M. 9504, and 9214; *Ex parte James*, 9 April 1803, 8 Vesey, 337; *Carter v. Palmer*, 8 March 1842, 8 Clark & Finnelly, 657. See also *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell's App. 374.

(n) *Pearson v. Murray*, 9 Nov. 1672, M. 2625; *Ford v. Crichton*, 20 July 1738, M. 4065.

(o) *Ludquhairn v. Haddo*, 28 March 1632, M. 9503; *Murray v. Murray*, *supra*; *Corsan v. M'Gowan*, 15 Jan. 1736, M. 9504.

(p) *Graham v. Freer*, 14 Jan. 1824, 2 S. 606 (N. E. 518).

(q) *Tait on Evidence*, 384; *Dickson on Evidence*, § 1734. As to Confidential Communications, see Chapter XVIII., p. 262.

(r) *Ersk. iv.* 2. 25 and 28; *More's Notes to Stair*, 414; *Bell's Prin.* § 2253; *Tait's Evidence*, 367 and 376.

this subject has, however, been placed on a more satisfactory footing by the Evidence Acts of 1852 and 1853.^(s) By the Act of 1852 it is *inter alia* declared that no person adduced as a witness in Scotland before any court or before any person having by law or by consent of parties authority to take evidence, shall be excluded from giving evidence by reason of agency or of partial counsel, provided always that nothing in the Act contained "shall affect the right of any party in the action or proceeding in which such witness shall be adduced to examine him on any point tending to affect his credibility;" and where any person who is or has been an agent shall be adduced and examined as a witness for his client, touching any matter or thing to prove which he could not competently have been adduced and examined according to the existing law and practice of Scotland, it shall not be competent to the party adducing such witness to object, on the ground of confidentiality, to any question proposed to be put to such witness on matter pertinent to the issue."^(t) By the Act of 1853, which repeals a restrictive clause in the Act of the previous year, it is made competent to adduce as a witness in any action or proceeding any person who shall at the time when he is so adduced as a witness be acting as agent in the action or proceeding in which he is so adduced.^(u) But this provision does not apply to the case of an agent conducting a consistorial cause, viz., "any action, suit, or proceeding instituted in Scotland in consequence of adultery, or for dissolving any marriage, or for breach of promise, or in any action of declarator of marriage, nullity of marriage, putting to silence, legitimacy or bastardy, or in any action of adherence or separation."^(v) An agent acting in any such cause cannot be adduced as a witness therein, "excepting in so far as the same may be competent by the existing law

(s) 15 Vict. c. 27; and 16 Vict. c. 20.

(t) 15 Vict. c. 27, § 1. Prior to the passing of the Evidence Act, it was held that a client by calling his agent as a witness waived the privilege of confidentiality; *Forteth v. E. of Fife*, 20 March 1821, 2 Mur. 467.

(u) 16 Vict. c. 20, § 2.

(v) 16 Vict. c. 20, § 4.

and practice of Scotland.”(x) This exception renders it necessary to state briefly in what circumstances the law and practice of Scotland formerly permitted the agent conducting a cause to be adduced as a witness for his client.

Former rule as to disqualification of agent conducting a cause, still applicable in consistorial causes.

13 The general rule of law was that, although the agent conducting a cause could be examined as a haver,(y) he was inadmissible as a witness in regard to facts which had occurred previous to his employment.(z) An agent who had conducted one cause was inadmissible in another arising out of it, and dependent on the same facts.(a) The partners of an agent conducting a cause were equally inadmissible, even though they had abstained from taking any part in its management.(b) A person who had once been agent in the cause could not be called to prove what he did when acting as agent in the cause.(c) But an equitable exception was introduced, “that an agent, attorney, or solicitor was always competent to give testimony in any cause in which they might be employed, where it is impossible to come to that species of evidence in any other manner whatever, and therefore necessary.”(d) In many cases, accordingly, the agent conducting the cause was allowed to be examined in regard to the preparation,(e) execution,(g) or delivery of a deed,(h) and the condition of the grantor’s

(x) 15 Vict. c. 27, § 2; 16 Vict. c. 20, § 4.

(y) *Cameron v. Cameron*, 2 March 1810, Hume, 901.

(z) *Adam v. Braco*, 2 July 1743, M. 16,745; *Lindsay v. Ramsay*, 12 July 1743, M. 16,746; *Govan v. Young*, 18 June 1752, M. 16,764.

(a) *Andersons v. Jeffrey*, 18 July 1826, 4 Mur. 102.

(b) *Carmichael v. Tait*, 7 Dec. 1822, 2 S. 75 (N. E. 68); *Andersons v. Jeffrey*, *supra* (a).

(c) *Gilchrist v. Dempster*, 10 Sept. 1823, 3 Mur. 364.

(d) *Per* Lord Mansfield in *M’Clatchie v. Burnet*, 22 March 1773, 2 Pat. 312. See also *King v. Stevenson*, 3 Dec. 1807, Hume, 344.

(e) *Wright v. Donaldson*, 16 May 1801, Hume, 900; *Wardrope v. Dickie*, 9 July 1806, Hume, 899; *M’Alpine v. M’Alpine*, 2 Dec. 1806, 13 F.C. 583, and *M. voce* Witness, Appx. No. 4.

(g) *Halliday v. Rule*, 16 July 1822, 3 Mur. 120; *Andersons v. Jeffrey*, 18 July 1826, 4 Mur. 102.

(h) *E. of March v. Sawyer*, 21 Nov. 1749, M. 16,757, reversed 2 April 1750, 1 Pat. 479.

mind at the time.(i) Questions of this kind are not likely to arise in consistorial causes; but the principle to be deduced from our old decisions, viz., that it was competent by the former law and practice of Scotland to examine the agent conducting a cause as to facts which could not be proved without his evidence, is still applicable to the case of an agent conducting a consistorial cause. An agent, however, should cease to act in such a cause, as soon as he knows that he may be a necessary witness in it.(k)

(i) *M'Clatchie v. Brand or Burnet*, 27 Nov. 1771, reversed 22 March 1773, 2 Pat. 312; *Scott v. Caverhill*, 19 Dec. 1786, M. 16,779; *M'Neill v. M'Neill*, 18 July 1822, 3 Mur. 150; *Andersons v. Jeffrey*, *supra* (g).

(k) See opinion of Lord Gillies in *M'Neill v. M'Neill*, *supra* (i).

CHAPTER XVIII.

CONFIDENTIAL COMMUNICATIONS BETWEEN
AGENT AND CLIENT.

Confidential
communi-
cations pro-
tected from
disclosure.

1. As it is absolutely essential to the due administration of justice that the most ample confidence should exist between litigants and their legal advisers, it has always been a well recognised rule of our law that advocates and law agents are neither bound nor entitled to disclose in evidence confidential communications made to them by their clients, whether orally or in writing, in relation to judicial proceedings, civil or criminal, which they have been employed to conduct.(a)

Law of
England.

2. The law relating to this subject is more matured in England than in Scotland; and, as it is not founded on any peculiarities of municipal law, but on general principles equally applicable to both countries, English authorities are frequently referred to in Scotch courts.(b) In *Greenough v. Gaskell*(c) the import of all the previous English cases was stated by Lord Chancellor Brougham, whose decision has

(a) *Stair* iv. 43. 9; *Ersk.* iv. 2. 25; 2 *Hume*, 350; *Burnett's Criminal Law*, 435; *Alison's Practice*, 468; *Tait's Evidence*, 384; *More's Notes to Stair*, 415; *Bell's Prin.* § 2254; *Shand's Practice*, 381; *Dickson on Evidence*, § 1861. The earliest reported decisions on this subject, are *Kirkwood v. Inglis*, 16 Dec. 1627, M. 342; *Cra. of Wamphray v. Lady Wamphray*, 21 Dec. 1675, M. 347; *Earl of Northesk v. Cheyn*, 15 July 1680, M. 353; and *Denman v. Earl of Balcarras*, 16 Feb. 1693, 1 *Fountainhall* 562, 4 *Br. Sup.* 73.

(b) *Lumsdaine v. Balfour*, 13 Nov. 1828, 7 S. 7; *McCowan v. Wright*, 14 Dec. 1852, 15 D. 229.

(c) 31 Jan. 1833, 1 *Mylne & Keen*, 98.

ever since been regarded as fixing the rule.(d) The Scotch cases are, however, sufficiently numerous to define and illustrate this branch of our law.

3. The privilege of confidentiality, is properly confined to advocates and law agents; it does not extend to communications with private friends or non-professional persons, such as factors and accountants.(e) But a factor corresponding with a law agent in regard to his constituent's affairs is regarded as occupying the same position as the constituent himself.(g) The privilege has, moreover, been extended to communications passing between co-defenders after an action has been threatened against them,(h) and to correspondence with an engineer, and a report prepared by him with reference to the subject of a contemplated action.(i) Communications to an unqualified legal practitioner do not appear to be protected,(k) except perhaps such as relate to the defence of criminal proceedings.(l) In any case, statements made to an intermediate party, to be conveyed to a professional agent, seem to be privileged, even although such party does not happen to be in the agent's employment.(m)

The privilege confined to professional men.

4. The privilege is confined to those facts which have come to the knowledge of agents or counsel in their professional capacity, and which cannot be divulged without a

Communications must be made professionally and confidentially.

(d) *Per Parke, B.*, in *Weeks v. Argent*, 6 May 1847, 16 Law Journal, Exchequer, 209. See, however, *Ford v. Tennant*, 28 Jan. 1863, 32 Law Journal, Chancery, 465, in which it was held, contrary to the opinion of Lord Brougham, that information obtained from a third party by a solicitor, while acting professionally for a client, is not privileged.

(e) *Burnett's Crim. Law*, 438; *Alison's Prac.*, 470; *More's Notes*, 415; *Bell's Notes*, 253; *Wright v. Arthur*, 15 Dec. 1831, 10 S. 139.

(g) *Munro v. Fraser*, 11 Dec. 1858, 21 D. 103.

(h) *Rose v. Medical Invalid Insurance Co.*, 27 Nov. 1847, 10 D. 156.

(i) *Wark v. Bargeddie Coal Co.*, 27 Feb. 1855, 17 D. 526; affirmed, 15 March 1859, 21 D. (H. L.) 1, and 3 Macq. 467.

(k) *Stuart v. Miller*, 29 May 1836, 14 S. 837.

(l) *Gavin v. Montgomerie*, 17 Dec. 1830, 9 S. 213; *Lord Advocate v. Hope or Walker*, 29 July 1845, 2 Brown, 465; *Dickson on Evidence*, § 1863.

(m) *Burnett's Crim. Law*, 435; *Stuart v. Miller*, *supra* (k).

breach of confidence.(n) Law agents and advocates are, therefore, competent witnesses as to facts falling under their observation as ordinary witnesses, such, for example, as the commission of a crime,(o) the execution of a deed,(p) the

(n) Bankton iv. 3. 27; Burnett's Crim. Law, 435; 2 Hume, 350; More's Notes, 415; Alison's Prac., 468. In the case of *Cullen v. Ewing*, 14 March 1832, 10 S. 497, it was incidentally held that a law agent could not be called to prove that false and calumnious statements, affecting the character of a third party, were made to him by his client, in the course of a lawsuit. The judgment was reversed on the merits; 24 Aug. 1833, 6 W. & S. 566. See also the following English cases:—*Cobden v. Kendrick*, 17 Nov. 1791, 4 Durnford & East, 431; *Spencely v. Schulenburg*, 25 April 1806, 7 East, 357; *Bramwell v. Lucas*, 31 May 1824, 2 Barnewall & Cresswell, 745; *Turquand v. Knight*, 1836, 2 Meeson & Welsby, 98; *Shore v. Bedford*, 28 Jan. 1843, 12 Law Journal, Common Pleas, 138; *Thomas v. Rawlings*, 2 June 1859, 5 English Jurist, N.S., 667. It has also been held in England that when an attorney has been professionally consulted, but has declined the employment, any communications that have passed between him and the intending client are privileged as confidential; *Cromack v. Heathcote*, 26 April 1820, 2 Broderip & Bingham, 4; *Peter v. Watkins*, 17 Jan. 1837, 4 Scott, 155, and 3 Bingham's New Cases, 421. When the residence of a ward of the Court of Chancery is being concealed, a solicitor is bound to give to the Court any information that may lead to the discovery of the ward's residence, although such information may have been communicated to him by his client in the course of his professional employment; *Ramsbotham v. Senior*, 22 July 1869, 8 Law Reports, Equity, 575. But there is no obligation on a solicitor to disclose the address of a client, in order that process may be served on him; *Shaw v. Neale*, 16 March 1858, 6 Clark, 581; *Heath v. Crealock*, 8 Feb. 1873, 15 Law Reports, Equity, 257. An attorney suing out a writ under the Common Law Procedure Act of 1852 is, however, bound, if ordered, to state the place of abode and the occupation of his client; 15 and 16 Vict. c. 76, § 7.

(o) Burnett's Crim. Law, 435; 2 Hume, 350; Lord Advocate v. M'Lean, 24 Sept. 1838, 2 Swinton, 183.

(p) See cases *supra*, p. 260. According to the law of England, "if an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument, but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it; upon such matters he has a right to be silent."—*Per* Lord Ellenborough, in *Robson v. Kemp*, 19 July 1803, 5 Espinasse, 54. See also *Doe v. Andrews*, 4 July 1778, 2 Cowper, 845.

hand-writing of their clients,(*q*) the tenor of documents which they have read,(*r*) or know of in any other way than through the information of their clients.(*s*) Hence, also, they may be examined as havers, either in an action of exhibition of writs, or under a commission and diligence, and in that capacity they must answer such questions as might competently be put to their clients,(*t*) and produce such documents as their clients might be obliged to produce.(*u*) Where an agent is employed to contract with third parties, communications between him and his client are admissible to prove the agent's authority and the terms of

(*q*) Burnett's Crim. Law, 437; Alison's Prac., 473; *Hurd v. Moring*, 26 July 1824, 1 Carrington & Payne, 372.

(*r*) Bankton iv. 3. 27; Ersk. iv. 2. 25; Crs. of Wamphray *v.* Wamphray, 21 Dec. 1675, M. 347; see also 3 Br. Sup. 473.

(*s*) Earl of Northesk *v.* Cheyn, 15 July 1680, M. 353. It has been held in England that an attorney in a cause is not bound to state the contents of a deed of which he first obtained a knowledge by obtaining and reading it at the suggestion of his counsel at the consultation in the cause; *Davies v. Waters*, 11 Feb. 1842, 11 Law Journal, Exchequer, 214. But an attorney who has obtained information from his client, and also from other sources, is bound to answer interrogatories respecting it; *Lewis v. Pennington*, 7 May 1860, 29 Law Journal, Chancery, 670. An attorney is also obliged to state by whom he is employed in an action; *Levy v. Pope*, 5 Dec. 1829, 1 Moody & Walkin, 410; see also Scotch case of *M'Leod v. M'Leod*, 21 Dec. 1744, M. 16,754, and Elchies, *voce* Witness, No. 26; or to identify his client; *Study v. Sanders*, 31 Jan. 1823, 2 Dowling & Ryland, 347. He is also bound to give evidence as to the condition of a document at the time of its production; *Brown v. Foster*, 28 Jan. 1857, 26 Law Journal, Exchequer, 249. In regard to proving that testamentary writings have been cancelled by mistake, see *Hampson v. Hampson*, 28 Feb. 1857, 26 Law Journal, Chancery, 612.

(*t*) *Kirkwood v. Inglis*, 16 Dec. 1627, M. 342; *A. v. B.*, 19 Nov. 1628, M. 16,663; *Betson v. Grange*, 14 Nov. 1628, M. 342, and 1 Br. Sup. 159; *Rollocks*, 1 Feb. 1666, M. 344; *Bathgate v. Armstrong*, 1 Feb. 1666, 1 Br. Sup. 520; and *Scott v. Napier*, 8 July 1737, M. 358, Elchies, *voce* Witness, No. 7, and 29 Nov. 1749, 1 Pat. App. 441; Bankton iv. 3. 27. As to what questions may be put, see Tait's Evidence, p. 181, and Dickson on Evidence, § 1357.

(*u*) *Campbell v. Campbell*, 21 Jan. 1823, 2 S. 139 (N. E. 128); *Fisher v. Bontine*, 22 Dec. 1827, 6 S. 330. The rules of English law in regard to the compulsory production of documents by parties to an action are not so stringent as with us; Pulling's Law of Attorneys, 5th ed., p. 259.

the bargain, even when it relates to the compromise of an action.(x) In one case the pursuer was allowed to recover correspondence passing between the defenders and their agents, for the purpose of proving that his claim had been intimated to the defenders, and that they knew of it prior to the institution of a counter action.(y)

Communi-
cations in
regard to
a contem-
plated ac-
tion.

5. It is now quite settled that the privilege is not limited to communications after an action has been actually raised, but that it covers all communications having reference to a contemplated or threatened action.(z)

Communi-
cations
having no
reference to
an action
raised or
contem-
plated.

6. It has never been positively decided in Scotland whether the privilege extends to communications which relate to matters within the ordinary scope of a law agent's duty, but which have no reference to any action raised or contemplated. In some early cases it seems to have been assumed that advocates (who formerly acted in the double capacity of agent and counsel) were not bound to reveal anything confidentially communicated to them by their clients.(a) In one case it was held that a person who had

(x) *Lumsdaine v. Balfour*, 13 Nov. 1828, 7 S. 7; *Jaffray v. Simpson*, 1 July 1835, 13 S. 1122, 10 F. Appx. 15; *Kid v. Bunyan*, 26 Nov. 1842, 5 D. 193; *Turner v. Railton*, 26 May 1796, 2 Espinasse, 274; see also *ante*, p. 100. It has been also held in England that where an agreement is made by two parties in the presence of their respective attorneys, the communications made by one party to his attorney in the hearing of the other are not privileged; *Weeks v. Argent*, 6 May 1847, 16 Law Journal, Exchequer, 209.

(y) *Anderson v. Lord Elgin's Trs.*, 10 March 1859, 21 D. 654.

(z) *Lady Bath's Exrs. v. Sir J. Johnston*, 12 Nov. 1811, 16 F.C. 345; *Jarvis v. Anderson*, 5 June 1841, 3 D. 990; *Rose v. Medical Invalid Insurance Co.*, 27 Nov. 1847, 10 D. 156; *Wark v. Bargeddie Coal Co.*, 27 Feb. 1855, 17 D. 526, affirmed 15 March 1859, 21 D. (H. L.) 1, and 3 Macq. 467; *Hay, Thomson & Blair v. Edinburgh and Glasgow Bank*, 26 Feb. 1858, 20 D. 701. Reference may also be made to the following English cases:—*Cromack v. Heathcote*, 29 April 1820, 4 Moore, 357; *Clark v. Clark*, 13 Dec. 1830, 1 Moody & Robinson, 3; *Clagget v. Phillips*, 25 Nov. 1842, 2 Younge & Collyer, Chancery, 82; *Hughes v. Garnons*, 22 June 1843, 6 Beavan, 352.

(a) *Crs. of Wamphray v. Lady Wamphray*, 21 Dec. 1675, M. 347; *E. of Northesk v. Cheyn*, 15 July 1680, M. 353; *Denman v. E. of Balcarras*, 16 Feb. 1693, 1 Fountainhall, 562, 4 Br. Sup. 73.

been agent in a cause could not be examined as to "such things as he learned in the course of that employment, without distinction whether they were told him as secrets of the cause or not; for the Lords were of opinion that everything he was informed of as agent belonged to the secrets of the cause, and therefore he was not obliged to reveal it;" and the reporter adds, "and the same decision will no doubt apply to a lawyer or any other man employed in law business in the way of his profession."(b) But in a subsequent case, in which letters by a client to his agent relative to the terms of a contract, and having no reference to any contemplated action, were ordered to be produced, Lord President Blair is reported to have observed that "communications being made to an agent, and confidentially, was no sufficient reason why production of them should not be called for; that it was only communications *in causa* which had any privilege in this respect."(c) In a still later case, however, in which the question turned upon the purpose for which a general service had been expedite fourteen years before the raising of the action, it was held by a majority of the Court that correspondence relative to the service was privileged;(d) and opinions have been expressed in several more recent cases(e) in favour of the rule of English law, which protects from disclosure all communications passing between a

(b) *Leslie v. Grant*, 8 Jan. 1760, 5 Br. Sup. 874.

(c) *Bower v. Russell*, 26 May 1810, 15 F.C. 675.

(d) *Lady Bath's Exrs. v. Sir J. Johnston*, 12 Nov. 1811, 16 F.C. 345.

(e) *Lumsdaine v. Balfour*, 13 Nov. 1828, 7 S. 7; *M'Cowan v. Wright*, 14 Dec. 1852, 15 D. 229; *Munro v. Fraser*, 11 Dec. 1858, 21 D. 103. In the second of these cases Lord Wood observed—"According to the law of Scotland, such communications are privileged, although they may not relate to any suit depending or contemplated or apprehended, and so it was substantially decided in the case of Lady Bath's Executors in 1811," *supra* (d). In *Munro v. Fraser*, Lord President M'Neill observed—"It cannot be said that the privilege of communication is limited to correspondence in reference to a depending action. It goes far beyond that. Neither is it limited to a communication in reference to a contemplated action. A person may take confidential advice in reference to his position which he is under apprehension may be assailed. Each case, of course, rests on its particular circumstances."

client to an attorney in his professional capacity, whether with reference to a suit or not, except only where the agent has been employed to contract with third parties.(g)

Memorial
for opinion
of counsel.

7. Mr Bell states in general terms that a party cannot insist on the production of a memorial for the opinion of counsel;(h) and in no case has production been compelled,(i) although an opinion of counsel has been admitted as evidence of *bona fides*.(k) Mr Dickson, however, points out that it has not yet been decided that the privilege extends beyond consultations in regard to a pending or anticipated suit.(l) The Bankruptcy Act specifies an opinion of counsel as a document of a confidential nature, which the trustee in a sequestration is not bound to insert in the sederunt book, or to exhibit to any other persons than the commissioners.(m)

The privilege of confidentiality
perpetual.

8. Confidential communications between a party and his legal adviser remain privileged notwithstanding the dissolution of the relation of agent and client.(n)

(g) It is quite settled in England that where an attorney or solicitor is employed to transact professional business, all communications passing between him and his client, in the course and for the purpose of that business, are privileged; *Greenough v. Gaskell*, 31 Jan. 1833, 1 Mylne & Keen, 98; *Shellard v. Harris*, 30 March 1833, 5 Carrington & Payne, 592; *Mynn v. Joliffe*, 22 Feb. 1834, 1 Moody & Robinson, 326; *Turquand v. Knight*, 1836, 2 Meeson & Welsby, 98; *Herring v. Cloberry*, 12 Feb. 1842, 11 Law Journal, Chancery, 149; *Carpmael v. Powis*, 25 March 1846, 1 Phillip, 687; *Pearce v. Pearce*, 22 Dec. 1846, 16 Law Journal, Chancery, 153.

(h) Bell's Prin. § 2254.

(i) Thomson's Trs. v. Clark, 4 March 1823, 2 S. 262 (N. E. 233); Edwards v. M'Intosh, 23 Dec. 1823, 3 Mur. 371; Clark v. Spence, 16 July 1824, 3 Mur. 455.

(k) Ewing v. Crichton, 15 March 1827, 4 Mur. 182.

(l) Dickson on Evidence, § 1872.

(m) 19 and 20 Vict. c. 79 § 84.

(n) Lady Bath's Exrs. v. Sir J. Johnston, 12 Nov. 1811, 16 F.C. 345; Hyslop v. Staig, 12 March 1816, 1 Mur. 17; Kerr v. D. of Roxburgh, 18 July 1822, 3 Mur. 141; Wight v. Ewing, 25 July 1828, 4 Mur. 587; Gavin v. Montgomerie, 17 Dec. 1830, 9 S. 213. It has been held in England that an attorney is not entitled to give up his client and act for the opposite party in any suit (*Cholmondeley v. Clinton*, 3 Feb. 1815, 19 Vesey, 261) unless it distinctly appears that he has obtained no information in his former character which would be prejudicial to the cause of his former

9. A law agent is bound not to disclose confidential communications, and it is the duty of the Court to enforce this obligation.^(o) Breach of professional confidence is a relevant ground for an action of damages.^(p)

Obligation to secrecy.

10. Confidentiality is the privilege of the client, not of the agent;^(q) and it may be waived by a client either expressly or by implication.^(r) A party adducing his agent as a witness is not entitled to object on the ground of confidentiality to any question proposed to be put on matter pertinent to the issue.^(s) Trustees are not allowed, in questions with beneficiaries, to plead confidentiality between themselves and the agent of the trust.^(t) When an agent acts for two parties in the same transaction, neither of them seems entitled to plead confidentiality in a question with the other.^(u)

Who are entitled to plead the privilege.

11. The privilege of confidentiality can never be pleaded to serve purposes of fraud or *mala fides*, or to prevent

Exception in case of fraud.

client to communicate; *Robinson v. Mullett*, 12 July 1817, 4 Price, 353; *Johnston v. Marriott*, 1833, 2 Crompton & Meeson, 183; *Grissell v. Peto*, 26 May 1832, 9 Bingham, 1; *Bricheno v. Thorp*, 5 Sept. 1821, 1 Jacob, Chancery, 300.

^(o) *Hyslop v. Staig*, *Kerr v. D. of Roxburgh*, and *Wight v. Ewing*, *supra* (n); *Davies v. Clough*, 10 Jan. 1837, 8 Simon, 262; *Lewis v. Smith*, 17 Nov. 1849, 1 Macnaughten & Gordon, 417.

^(p) *Kerr v. D. of Roxburgh*, 18 July 1822, 3 Mur. 141; *Bogle v. Cameron*, 16 Feb. 1844, 6 D. 682; *Moore v. Terrell*, 8 May 1833, 4 Barnewall & Adolphus, 870; *Taylor v. Blacklow*, 8 Nov. 1836, 3 Bingham's New Cases, 235.

^(q) *Gavin v. Montgomerie*, 17 Dec. 1830, 9 S. 213; *Inglis v. Gardner*, 21 March 1843, 5 D. 1029; *Parkhurst v. Lowten*, 28 Jan. 1819, 2 Swanston, 216; *Herring v. Clowbery*, 12 Feb. 1842, 11 Law Journal, Chancery, 153.

^(r) *Forteith v. E. of Fife*, 20 March 1821, 2 Mur. 467; *Jarvis v. Anderson*, 5 June 1841, 3 D. 990; *Noble v. Scott*, 23 Feb. 1843, 5 D. 723; *Tait on Evid.*, 180; *Merle v. Moore*, 9 May 1826, 2 Carrington & Payne, 275.

^(s) 15 Vict. c. 27, § 1; *Forteith v. E. of Fife*, *supra* (r). See *ante*, p. 259.

^(t) *Telfer v. Telfer's Tra.* 25 May 1830, 8 S. 797.

^(u) *D. of Hamilton v. Hamilton*, 25 May 1819, 19 F.C. 740; *Kid v. Bunyan*, 26 Nov. 1842, 5 D. 193; *Bogle v. Cameron*, 16 Feb. 1844, 6 D. 682; *Baugh v. Cradocks*, 14 May 1832, 1 Moody & Robinson, 182; *Cleve v. Powell*, 29 Nov. 1832, 1 Moody & Robinson, 228; *Perry v. Smith*, 22 April 1842, 9 Meeson & Welsby, 681; *Tugwell v. Hooper*, 1 Feb. 1847, 16 Law Journal, Chancery, 171.

the disclosure of fraudulent transactions.(x) It has, moreover, been held that letters between a party and his law agent may be recovered if they form the *res gestæ* of a transaction struck at by the Act 1621, c. 18, against alienations by bankrupts to conjunct and confident persons.(y) But even in such cases, part of the correspondence may be protected as properly confidential;(z) and when legal proceedings are taken for the reduction of a fraudulent transaction, communications relating to such proceedings, although previous to their actual institution, are entitled to the privilege.(a)

Exception
under Bank-
ruptcy Act.

12. Under the Bankruptcy Act of 1856 the sheriff may at any time, on the application of the trustee,(b) order an examination of the bankrupt's factors, law agents, and others, who can give information relative to his estate; and such persons must answer all lawful questions relating to the affairs of the bankrupt; and the sheriff may order them to produce for inspection any documents in their custody relative to the bankrupt's affairs.(c) These statutory provisions seem to abrogate the common law in regard to confidential communications,(d) but only in so far as such

(x) *M'Leod v. M'Leod*, 21 Dec. 1744, M. 16,754, Elchies, *vocs* Witness, No. 26; *Keith v. Purves*, 1684, M. 354; *Inglis's Tr. v. Commercial Insurance Co.*, 29 June 1831, 9 S. 842; *Kid v. Bunyan*, *supra* (u); *Inglis v. Gardner*, 21 March 1843, 5 D. 1029; *Millar v. Small*, 10 Dec. 1856, 19 D. 142; *Munro v. Fraser*, 11 Dec. 1858, 21 D. 103; *Morrison v. Somerville*, 21 Dec. 1860, 23 D. 232; *Tait on Evidence*, 385; *Dickson on Evidence*, § 1875.

(y) *M'Cowan v. Wright*, 10 March 1853, 15 D. 494.

(z) *M'Cowan v. Wright*, *supra* (y).

(a) *Jarvis v. Anderson*, 5 June 1841, 3 D. 990. It has been held in England that in order to take communications between solicitor and client out of the general rule as to privilege, it must be shown that the solicitor is a party to the fraud; *Charlton v. Coombes*, 16 March 1863, 32 Law Journal, Chancery, 284. See also *Cromack v. Heathcote*, 26 April, 1820, 2 Broderip & Bingham, 4.

(b) The trustee does not require to condescend particularly on the information which he expects to obtain; *Park v. Robson*, 21 Oct. 1871, 10 Macph. 10.

(c) 19 and 20 Vict. c. 79, §§ 90 and 91.

(d) *Dickson on Evidence*, § 1877; *Sawers v. Baggart*, 17 Dec. 1858, 21 D. 153.

communications relate to the bankrupt's estate or affairs.(e) Under the corresponding provision of a former statute,(g) a bankrupt's law agent (though not one of the persons specially named in the statute) was, in the special circumstances of one case, ordered to be examined, notwithstanding the objection that he possessed no knowledge of the bankrupt's affairs except what had been communicated confidentially for the purpose of enabling him to conduct certain processes.(h) But an agent cannot be examined in regard to a transaction in which he has acted for both the bankrupt and a party litigating with the trustee in the sequestration.(i) It is doubtful whether an agent entering *bona fide* into a transaction with a client who subsequently becomes insolvent, can object to be examined, on the ground that he might thereby endanger his right as a creditor on the sequestrated estate; but an agent who has been employed merely to take out sequestration cannot exempt himself from examination by assuming the character of a creditor.(k)

13. Although a diligence will not be granted for the recovery of documents which are clearly inadmissible as evidence,(l) the question of their admissibility will not, in general, be discussed on the motion for a diligence.(m) A commission and diligence is always granted under the implied qualification that only such documents are to be recovered as are not subject to the objection of confidentiality.(n) When a law agent is cited as a haver, he ought

Practice of
the Court in
regard to
confidential
communi-
cations.

(e) *Tod's Tr. v. Officer*, 17 July 1872, 10 Macph. 980, where the law agent of a bankrupt who had failed to appear at the statutory examination was held not bound to answer the question—"Do you know where the bankrupt is now?"—on the ground that it had no relation to the bankrupt's affairs.

(g) 54 Geo. III. c. 137, § 32.

(h) *Mackersey v. Mackenzie*, 1 Mar. 1823, 2 S. 256 (N. E. 225).

(i) *Paul v. Laing's Trustee*, 21 Feb. 1855, 17 D. 457.

(k) *A. B. v. Binny*, 4 June 1858, 20 D. 1058.

(l) *Fraser v. Laing*, 14 Nov. 1823, 2 S. 491 (N. E. 433) *Mackintosh v. Macqueen*, 13 May 1828, 6 S. 784; *Lumsdaine v. Balfour*, 13 Nov. 1828, 7 S. 7.

(m) *Dickson on Evidence*, § 1345.

(n) *M'Donald v. M'Donald*, 6 March 1844, 6 D. 954.

to decline to produce any document that can possibly be regarded as confidential, leaving it to the commissioner or the Court to decide whether it is protected or not. (o) Part of a document or of a correspondence may be confidential, while the rest is not, in which case excerpts will be taken of the part which is not privileged. (p) It is doubtful whether a party is to be held to have waived the privilege by allowing documents to be recovered under a diligence without objection at the time. In one case, in which a letter, alleged to be confidential, had been so recovered, and no motion had been made for its withdrawal from the process, an objection to its production at a jury trial is reported to have been repelled. (q) But the accuracy of the report was called in question in a later case, in which it was stated that, the case having been one of fraud, the objection could not have been taken at any stage. (r)

As to the practice of the Court in deciding whether documents sealed up by a commissioner are confidential or not, reference may be made to the cases under noted. (s)

(o) See *Hay, Thomson & Blair v Edinburgh & Glasgow Bank*, 26 Feb. 1858, 20 D. 701.

(p) *Bower v. Russell*, 26 May 1810, 15 F.C. 675; *E. of Fife v. E. of Fife's Trs.* 29 Oct. 1816, 1 Mur. 103; *M'Cowan v. Wright*, 14 Dec. 1852, 15 D. 229; *Millar v. Small*, 10 Dec. 1856, 19 D. 142.

(q) *Hercules Insurance Co. v. Hunter*, 27 July 1836, 14 S. 1137, and 15 S. 800.

(r) *Noble v. Scott*, 23 Feb. 1843, 5 D. 723.

(s) *Campbell v. Campbell*, 21 Jan. 1823, 2 S. 139 (N. E. 128); *Aitkenhead v. Black*, 22 June 1838, 16 S. 1183; *Watt v. Mitchell*, 8 March 1839, 1 D. 698; *Jarvis v. Anderson*, 5 June 1841, 3 D. 990; *Munro v. Fraser*, 11 Dec. 1858, 21 D. 103. See also *Dickson on Evidence*, § 1362.

CHAPTER XIX.

ON THE RULE PROHIBITING LAW AGENTS ACTING AS TRUSTEES FROM MAKING PROFESSIONAL CHARGES.

1. The law of Scotland has always recognised the rule of the Civil Law, that a person holding a fiduciary character cannot be *auctor in rem suam*, (a) that is to say, cannot authorise any transaction by which an obligation may be created in his own favour against those whose interests he is bound to protect. (b) It is a corollary of this principle that a person who has accepted the office of trustee or guardian is not entitled to derive any profit or emolument from the estate under his charge, even although the estate may have benefited by his professional services; and this has always been the rule of law in England. (c) But the Civil Law admitted of a sort of exception to the general rule, viz., that when there were several tutors, a quorum might bind their ward to a contract with a co-tutor who did not himself interpose his authority as tutor; (d) and this excep-

Former law of Scotland in regard to trustees acting as agents, &c.

(a) D. xxvi., 8. 1. *pr.*; D. xviii., 1. 34. 7; Gaius, i., 184.

(b) Stair, i. 6. 17; Ersk. i. 7. 19; Aitken v. Hunter, 24 May 1871, 9 Macph. 756.

(c) *Robinson v. Pett*, 1734, 3 Peere Williams, 249; *New v. Jones*, 8 Aug. 1833, 1 Hall & Twell, 632; *Moore v. Frowd*, 15 Aug. 1837, 3 Mylne & Craig, 45; *Fraser v. Palmer*, 3 July 1841, 4 Younge & Collyer, Exchequer, 515; *Bambridge v. Blair*, 25 June 1845, 8 Beavan, 588; *Broughton v. Broughton*, 14 July 1855, 5 De Gex Macnaughten & Gordon, 160, and 2 Smale & Gifford, 422; Lewin on Trusts, 5th edition, pp. 230 and 447; Pulling's Law of Attorneys, 5th edition, p. 324.

(d) D. xxvi., 8. 5, *pr.*

tion was formerly adopted by the practice, if not by the law of Scotland, to the effect of permitting tutors, curators, and trustees to nominate one of their number to act as their law agent, factor, or cashier, and to allow him remuneration at the ordinary rate for his services in any of those capacities.(e)

Change
brought
about by
Home v.
Pringle.

2. But the exception thus borrowed from the Civil Law was abolished in 1841. In that year the state of our law on this subject was brought under the notice of the House of Lords in the leading case of *Home v. Pringle*, in which the Court of Session had held that it was competent for trustees to appoint one of their number to be factor, another to be cashier, and a third to be law agent of the trust, each with an adequate salary.(g) The judgment was affirmed on very special grounds, but Lord Chancellor Cottingham observed:—"It is said that the practice, if not the law of Scotland, sanctions such appointments, and the case of *Montgomerie v. Wauchope*(h) is referred to in proof of that proposition. Nothing was decided in that case upon that point, but the judges stated that such appointments were not inconsistent with the law of Scotland, and that a trustee, appointed by his co-trustees, was entitled to the usual remuneration of an agent or cashier. This is the real question, because it is not necessary to hold that the appointment is illegal, in order to maintain the principle, that a party who, having accepted the office of trustee, which, unless otherwise provided for by the trust, must be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust-property in respect of such employment. That the office of trustee and of factor or cashier to the property, are inconsistent, cannot be disputed. If the execution of the trust requires such appointments, it be-

Opinion of
Lord Chan-
cellor Cot-
tingham.

(e) Ersk. i. 7. 19; Forsyth on Trusts, p. 449; *Montgomerie v. Wauchope*, 4 June 1822, 20 F.C. 620, 1 S. 453 (N. E. 421); *Darling v. Adamson*, 26 Nov. 1834, 13 S. 93; *Aitken v. Hunter*, 24 May 1871, 9 Macph. 756.

(g) 30 Nov. 1837, 16 S. 142; in the House of Lords, 22 June 1841. 2 Rob. 384. See *post*, p. 276, note (n).

(h) 4 June 1822, 20 F.C. 620, 1 S. 453 (N. E. 421).

comes the duty of the trustee to exercise his discretion and judgment in the selection of the officers, and his vigilant superintendence of their proceedings when appointed, all which is lost to the trust when a trustee is appointed to the execution of those duties. Therefore the Courts of Equity in England, in such cases, refuse to the trustee any remuneration which would come to others from the appointment, which produces the salutary effect of deterring trustees from making such appointments when not actually required; and, when such necessity exists, preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule, as acted upon in England, is not disputed, and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland.”(i)

(i) In the English case of *Broughton v. Broughton* (14 July 1855, 5 De Gex Macnaughten & Gordon, 160), the nature of the rule was thus explained by Lord Chancellor Cranworth :—“The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this court says he shall not make it to himself; and it says the same in the case of agents where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer is this, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result, therefore, is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made.” To the same effect, Vice-Chancellor Kin-

Should retrospective effect be given to the new rule of law?

3. The opinion thus authoritatively expressed by the Lord Chancellor has been repeatedly approved of by the Court of Session, and it is now part of the law of Scotland.^(k) Whether, however, it should be regarded as having introduced a new rule, to which retrospective effect ought not to be given, is somewhat doubtful. In one case, payments made by trustees to two of their number, as factor and cashier, previous to 1841, were objected to by the beneficiaries; but the Court sustained the payments, as having been made *in bona fide*, and in accordance with the general practice of the time.^(l) But in a recent case it was pointed out that, though the trustees might be entitled to take credit for payments made by them *in bona fide*, the particular trustees who received the remuneration might nevertheless be bound to repay the amount to the beneficiaries,^(m) a view to which effect had been given by the Lord Ordinary (Jerviswoode) in a previous case, which is not reported on this point.⁽ⁿ⁾ The question, however, is now of little practical

dersey, in *Pollard v. Doyle*, 12 Nov. 1860, 3 Law Times, N. S., 432, and 6 English Jurist, N. S., 1139.

(k) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310; *Cullen v. Baillie*, 20 Feb. 1846, 8 D. 511, affirmed 19 June 1855, 18 D. (H. L.) 40, 2 Macq. 80; *Bon Accord Marine Insurance Company v. Souter's Trs.*, 13 June 1850, 12 D. 1010; *Fegan v. Thomson*, 20 July 1855, 17 D. 1146; *Wellwood's Trs. v. Boswell or Hill*, 17 Dec. 1856, 19 D. 187; *M'Laren on Wills and Successions*, ii. 174 and 553.

(l) *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 765.

(m) *Aitken v. Hunter*, 24 May 1871, 9 Macph. 756.

(n) *Farquharson's Tr. v. Farquharson*, 6 Jan. 1863. The case came before the Inner House on 16 June 1866, under which date the session papers will be found containing the Lord Ordinary's interlocutor quoted below; but the question above referred to was not discussed in the Inner House. The testator had left to each of his trustees a legacy of £100 "for the trouble they may have in my affairs;" and farther, authorised "the retention out of my estate of a proper recompense for their trouble in the execution thereof, and of all expenses incurred by them in the employment of persons necessary." But the trust-deed did not expressly authorise the trustees to appoint factors and cashiers from their own number. The accountant to whom the case was remitted disallowed charges for factor fee and commission made by the trustees both before and after 1841; and the Lord Ordinary repelled the objections stated to the accountant's

importance, as 32 years have passed since the law of Scotland was assimilated in this respect to that of England. But whatever may have been the extent of the change brought about by the case of *Home v. Pringle*, it has been recently held that a single trustee was never permitted by the law of Scotland to appoint himself agent and factor for the trust, and that he was therefore not entitled to take credit in

report by the representatives of the trustees. In a note to his interlocutor his Lordship observes:—"The Lord Ordinary has, in dealing with these objections, gone over the various leading cases bearing on the question, and to which he was referred. It was strongly pressed upon him that the law under which it is now fixed that a trustee cannot make profit of his office, or hold an office of profit under the trust, unless by express authority from the truster, was of modern introduction, and ought not to have a retrospective effect here. And if the Lord Ordinary's notes serve him aright, the case of *Home v. Pringle and others*, and the case of *Miller's Trs. v. Miller*, were mainly relied on as sufficient to warrant the Court not to disallow the charges here. It is true that in the case of *Home* the Lord Chancellor did not in fact disallow the salary which Mr Pringle had, as was said, been allowed in the accounts which had been examined and settled according to the provisions of the trust-deed there, and for the opening up of which accounts no case had been made. But it is impossible to read the opinion of the Lord Chancellor in that case without observing that it was in the special case and not on any general principle that Mr Pringle's salary was not disallowed; and accordingly, as the Lord Ordinary believes, the opinion of the Lord Chancellor as there given has been held to rule the law, and has affected many judgments since in the direction opposite to that in which the objectors would here apply it. Again, in the case of *Miller*, the Court did not doubt the general rule of law, though their Lordships saw cause for its non-application there. But, as observed by the counsel for Allargue in the present case, the question there truly was with a surviving trustee who had neither held an office under the trust nor was the direct representative of such trustee. But the attempt was made under the form of disallowing charges for allowance to two former trustees truly to subject the remaining trustee in liability for profits drawn by them as cashier and factor respectively for the trust. This the Court would not sanction. But Lord Mackenzie expressly states—'There only remains the objection,' &c. . . . Mr F. of W. and Mr F. T. are the direct holders, or direct representatives of holders, of the offices of profit within the trust, which are here objected to; and the Lord Ordinary is therefore unable to see grounds on which to sanction the objections taken for them to the accountant's report."

his accounts for remuneration in those capacities even prior to 1841.(o)

Rule appli-
cable to all
persons
holding a
fiduciary
character.

4. Although the rule, that a trustee is not entitled to make any profit out of the estate under his charge, was first enunciated as if it applied only to the case of a trustee acting under a *mortis causa* deed, it is now quite settled that it is equally applicable to trustees under trust-deeds *inter vivos*,(p) and to all other persons holding a fiduciary character,(q) such as tutors and curators,(r) curators *bonis*,(s) judicial factors,(t) factors *loco tutoris*,(u) and parliamentary trustees.(x) But a law agent appointed tutor or curator *ad litem* is entitled to remuneration at the ordinary rate for his professional services;(y) and it is quite customary for such a tutor or curator to conduct the case of his ward, either personally or by a firm of which he is a partner.(z) It is doubtful whether a commissioner on a sequestrated

(o) Aitken v. Hunter, 24 May 1871, 9 Macph. 756.

(p) Lauder v. Millars, 15 July 1859, 21 D. 1353 ; and Johnston's Tra. v. Johnston's Crs., 4 Jan. 1738 (reported in 21 D. 1383). These were cases of voluntary trusts for behoof of creditors.

(q) It has been decided in England than an executor is in the same position as a trustee, as regards remuneration ; Pollard v. Doyle, 12 Nov. 1860, 3 Law Times, N. S., 432, and 6 English Jurist, N. S., 1139 ; and there can be no doubt that in Scotland the rule is the same, the position of an executor, as such, under the Intestate Moveable Succession Act, being simply that of a gratuitous trustee ; 18 and 19 Vict. c. 23, § 8 ; Bell's Lectures on Conveyancing, p. 864.

(r) Fegan v. Thomson, 20 July 1855, 17 D. 1146 ; Kennedy v. Rutherglen, 25 Jan. 1860, 22 D. 567 ; Fraser on Parent and Child, p. 279.

(s) Morrison v. Rennie, 14 July 1847, 9 D. 1483, reversed 26 April 1849, 6 Bell, 422 ; see also 11 D. 1201 ; Lord Gray and others v. Mackenzie, 21 June 1856, 19 D. 1.

(t) Flowerdew's Trs., 22 Dec. 1854, 17 D. 263.

(u) Lord Gray and others v. Mackenzie, 14 June 1856, 19 D. 1.

(x) Lord Gray v. Dundas & Wilson, 21 June 1856, 19 D. 1 ; Wellwood's Trs. v. Boswell or Hill, 17 Dec. 1856, 19 D. 187.

(y) Pirie or Collie v. Collie, 4 March 1851, 13 D. 841 ; Moncreiffe v. Sinclair, 19 July 1859, 21 D. 1359. See also Rennie, 27 June 1849, 11 D. 1201.

(z) Bankton, vol. i. p. 203 ; M'Glashan's Sheriff-Court Practice, 4th edition, p. 96.

estate should be regarded as holding such a fiduciary character as to disqualify him from acting as law agent for the trustee. In the only case in which the question was raised, a bankrupt who had litigated unsuccessfully with the trustee on his estate, and had been found liable in expenses, was held not entitled to maintain the objection, on the ground that he was in the position of a third party, stating the objection not for, but against, the bankrupt estate.(a)

5. A person holding a fiduciary character is, of course, always entitled to be reimbursed actual outlays which he has properly made for the estate under his charge.(b) Trustees in sequestrations,(c) judicial factors, factors *loco tutoris*, and curators *bonis*,(d) are, besides, entitled to a commission for their services.(e) Although law agents acting in those capacities, are not allowed to make professional charges, yet if they act also as agents, they are entitled to their costs out of pocket;(g) and it may even be competent for the Court, in fixing the amount of their commission, to inquire

Outlays,
and in some
cases com-
mission,
allowed.

(a) *Learmonth v. Paterson*, 13 Feb. 1858, 20 D. 564.

(b) *Johnston's Trs. v. Johnston's Crs.*, 4 Jan. 1738, reported in 21 D. 1383; *Morrison v. Rennie*, 26 April 1849, 6 Bell 422, and 23 Nov. 1849, 12 D. 163; *Wellwood's Trs. v. Boswell or Hill*, 17 Dec. 1856, 19 D. 187. See also the English cases of *Moore v. Frowd*, 15 Aug. 1837, 3 Mylne & Craig, 45; *Fraser v. Palmer*, 3 July 1841, 4 Younge & Collyer, Exchequer, 515; and *Bambridge v. Blair*, 25 June 1845, 8 Beavan, 588; and also 22 and 23 Vict. c. 35, § 38.

(c) The amount of commission to a trustee in a sequestration is fixed by the commissioners; 19 and 20 Vict. c. 79, § 125; *Bruce v. Davenport & Co.*, 7 July 1825, 4 S. 152; *Haston v. Chapman*, 1 March 1826, 4 S. 509 (N. E. 517). Five per cent. on the funds recovered is generally allowed: 2 Bell's Com. (M'Laren's edition), p. 320.

(d) When the nearest agnate of the ward is appointed *curator bonis*, it is generally upon condition of his acting gratuitously; but if this condition is not imposed at the time of the appointment, it will not be enforced *ex post facto*; *Macdonald v. Macdonald*, 8 July 1854, 16 D. 1024; *Accountant of Court v. Watt*, 2 June 1866, 4 Macph. 772.

(e) *Thoms on Judicial Factors*, p. 195.

(g) *Lord Gray v. Mackenzie*, 21 June 1856, reported under date 12 Nov. 1856, 19 D. 1.

how far the estate has been benefited by their professional services.(h)

Profits not
made out of
trust-estate.

6. A law agent acting as a trustee is bound to account to the beneficiaries only for profits made by him out of the trust-estate, and not for profits accruing to him from other sources, owing to his connection with or management of the trust. Thus, where a trustee, who was a solicitor, sold out stock forming part of the trust-estate, and invested it on mortgage, but made no charge against the trust-estate for his services, the *cestuis que trust* were held not entitled to profits derived by him as a solicitor in consequence of part of the mortgaged estate being used for building purposes.(i)

Rule appli-
cable to a
trustee's
partners.

7. When a person holding a fiduciary character is a partner in a legal firm, and employs his own firm to conduct the professional business of the estate under his charge, no charge can be made by the firm, even although the business has been done by another partner.(k) It was, however, held by Vice-Chancellor Wood, in an English case, in 1861, that a trustee may employ his partner as solicitor to the trust, and pay him the usual professional charges, provided there is an express agreement that the trustee himself is not to participate in the profits, or to have any benefit from such charges.(l) "But perhaps it would be hardly safe for the profession to deduce from this case that a trustee would generally be justified in allowing to his partner a remuneration for his services."

(h) See opinions of Lord Justice-Clerk Hope, and Lord Curriehill in *Lord Gray v. Mackenzie*, *supra* (g); and *Welsh v. Jackson*, 23 Dec. 1864, 3 Macph. 303.

(i) *Whitney v. Smith*, 19 March 1869, 4 Law Reports, Chancery Appeals, 513.

(k) *Lord Gray v. Mackenzie*, 21 June 1856, reported under date 12 Nov. 1856, 19 D. 1; *Collins v. Carey*, 23 July 1839, 2 Beavan, 128; *Christophers v. White*, 27 July 1847, 10 Beavan, 523; *Lincoln v. Windsor*, 9 July 1851, 9 Hare, 158; *Lyon v. Baker*, 30 June 1852, 5 De Gex & Smale, 722. It has also been held in England, that when a trustee who is a solicitor, appoints another solicitor to act for the trust on agency terms, he does so for the benefit of the trust, he himself not being entitled to make any profit by the arrangement; *In re Taylor*, 8 Feb. 1854, 23 Law Journal, Chancery, 857.

(l) *Clark v. Carlon*, 7 May 1861, 7 English Jurist, N. S., 441.

neration for the services of the firm out of the trust-property."^(m)

8. Some confusion has been introduced into the law both of England and of Scotland by the case of *Cradock v. Piper*, in which Lord Chancellor Cottenham (who had himself laid down the rule of law in the most absolute terms in the case of *Home v. Pringle*) held that a solicitor and trustee, acting for himself and his co-trustees in a suit in which they had been made defendants, was entitled to the usual professional charges, as it did not appear that the costs had been increased through his own conduct.⁽ⁿ⁾ But the soundness of this decision has been called in question by Lord Chancellor Cranworth and Lord Brougham;^(o) and it has been held in England that, at all events, the exception supposed to have been introduced by *Cradock v. Piper* is strictly confined to judicial proceedings,^(p) and that it does not apply to the case of a single trustee defending himself by a partner.^(q) The case of *Cradock v. Piper* can, therefore, be regarded as, at most, an authority only to this extent, that the general rule may be relaxed where several trustees, being obliged to defend an action, have employed a professional man of their own number to conduct the joint defence.^(r) There is, how-

Confusion
caused by
Cradock v.
Piper.

(m) Pulling's Law of Attorneys, 5th edition, p. 325. A factor appointed under the 164th section of the Bankruptcy Act (19 and 20 Vict. c. 79), "when he shall find it to be necessary to have the services of a law agent in matters properly belonging to that profession, shall be entitled to employ one not connected with him as a partner."—A. S. 11 March 1851, § 25.

(n) 22 Jan. 1850, 1 Hall & Twell, 617, and 1 Macnaughten & Gordon, 664.

(o) Cullen v. Baillie, 19 June 1855, 18 D. (H. L.) 40; 2 Macq. 80. See also Lord Gray v. Mackenzie, 21 June 1856, 19 D. 1; Lewin on Trusts, 5th edition, p. 231; and M'Laren on Wills and Succession, ii. 174.

(p) *Lincoln v. Windsor*, 9 July 1851, 9 Hare, 158, 20 Law Journal, Chancery, 531. See also Findlay's Trs. v. M'Combe, 6 March 1852, 14 D. 621.

(q) *Lyon v. Baker*, 30 June 1852, 5 De Gex & Smale, 622.

(r) In the case of *Broughton v. Broughton* (14 July 1855, 5 De Gex, Macnaughten & Gordon, 160, and 2 Smale and Giffard, 422), Lord Cranworth observed:—"I must own, speaking with all deference, and not meaning to decide anything on the point, that I cannot see any distinction

ever, no Scotch case in which it has been recognised as authoritative even to this limited extent. In the only case in which the question arose, a trustee, who was also a country writer, was held not entitled to make professional charges for matters connected with the general management of the trust; but the question whether he was entitled to make such charges in conducting judicial proceedings was reserved.^(s) In a recent case, Lord Deas referred, *obiter*, to *Cradock v. Piper* as an authority; but it does not appear from the report whether the more recent English cases were brought under his Lordship's notice.^(t)

Two exceptions to the general rule.

9. The rule that a person holding a fiduciary character cannot derive any profit from the estate under his charge is subject to two exceptions,—(1) when it is declared in the deed constituting the trust that he is to receive remuneration for his services; and (2) when the beneficiaries agree to allow such remuneration.

Remuneration allowed by the trust-deed.

10. "One continually sees provisions introduced into wills and settlements enabling a solicitor acting as trustee to receive remuneration just as if he had not been appointed trustee, and it is very often convenient to make this arrangement."^(u) Provisions of this kind are, however, very strictly

between costs incurred in a suit and costs incurred in administering an estate without a suit. . . . In *Cradock v. Piper*, however, the general rule might have been probably safely relaxed; and where the question related to charges incurred in a suit, there would be considerably less danger in relaxing it where the parties had been made defendants than where they had filled the character of plaintiffs. If, therefore, the circumstances of the case before me had brought it within the same class, I should have felt myself bound to follow the decision of Lord Cottenham, which, however, appears to me to overrule the previous decision of the Master of the Rolls in *Bambridge v. Blair*." Prior to the case of *Cradock v. Piper*, in exceptional circumstances, the application of a trustee had sometimes been granted, for a reasonable compensation for his labour and time, both retrospectively and prospectively, but never in the shape of professional remuneration; *Marshall v. Holloway*, 20 April 1820, 2 Swanston, 432; *Bambridge v. Blair*, 25 June 1845, 8 Beavan, 588.

(s) Findlay's Trs. v. McCombe, 6 March 1852, 14 D. 621. The rubric of the report is erroneous.

(t) Scott v. Handyside's Trs., 30 March 1868, 6 Macph. 753.

(u) Per Lord Chancellor Cranworth in *Broughton v. Broughton*, 14 July

construed; and if there is any doubt as to their meaning, nothing beyond actual outlay will be allowed. Thus, where a trust-deed provided that the trustees should reimburse themselves out of the trust-funds for all such reasonable costs, charges, and expenses as they should or might sustain, expend, or be put unto, such costs, &c., to be reckoned, paid, and stated as between attorney and client, it was held by Lord Chancellor Cottenham that the clause did not authorise any payment for trouble or professional services.^(x) The offices of law agent and factor being in their nature remunerative, it has been held by the First Division (Lord Deas dissenting) that express authority to allow remuneration is not necessary where the truster gives his trustees power "to appoint agents and factors, either of their own number or other fit persons."^(y) But, on the other hand, where the trust-deed specifies one particular kind or mode of remuneration, it will not be held to include any others. Thus, where a trust-deed authorises "a suitable remuneration" to the trustee, he is not entitled, unless power is given him to act as law agent for the trust, to make professional charges, although it may perhaps be competent, in fixing the amount of the remuneration to be allowed him, to take into consideration services rendered by him as a law agent.^(z) Similarly, authority to allow suitable remuneration to a trustee appointed factor for the trust, does not entitle him to make professional charges, in addition to his factor fee, for matters connected with the general management of the estate.^(a) The amount of remuneration is, of course, always dependent

1855, 5 De Gex, Macnaughten & Gordon, 160. See also *In re Sherwood*, 4 Nov. 1840, 3 Beavan, 338.

(x) *Moore v. Frowd*, 15 Aug. 1837, 3 Mylne & Craig, 45.

(y) *Goodsir v. Carruther's*, 19 June 1858, 20 D. 1141. See also *Douglas v. Archbutt*, 16 Feb. 1858, 2 De Gex & Jones, 148, where an auctioneer, who had been appointed a trustee, and directed to sell the truster's estate, and to apply the money, in the first place, in payment of the costs, including the usual auctioneer's commission, was held entitled to charge his own commission on the sale.

(z) *Welch v. Jackson*, 23 Dec. 1864, 3 Macph. 303.

(a) *Findlay's Trs. v. M'Combe*, 6 March 1852, 14 D. 621.

on the circumstances of each particular case ;(b) and if the sum allowed by trustees is excessive, it will be reduced by the Court.(c) In an English case, a solicitor, who had been appointed executor with power to charge for his professional services, was held entitled to charge only for services strictly professional, and not for matters which an executor ought to attend to without the intervention of a solicitor.(d)

Remuneration may be allowed by the beneficiaries.

11. When a law agent, who has been appointed a trustee under a deed which contains no provision enabling him to claim remuneration, is unwilling to act gratuitously, he ought, before accepting the office, to make an express agreement with the beneficiaries that he is to receive remuneration, whether for his time and trouble generally, or for his services as law agent, factor, or cashier for the trust. But it is requisite to the validity of such an agreement, not only that the beneficiaries be *sui juris*.(e) but also that they be aware of the rule of law which prevents trustees making any profit out of the trust-estate.(g) Moreover, bargains between trustees and beneficiaries in regard to remuneration must be freely made, and not submitted to from pressure.(h) An express agreement, however, is not absolutely necessary; for if a trustee acts as agent or factor for the trust on the understanding that he is to receive remuneration, and the beneficiaries acquiesce in his making professional charges, &c., they become his true employers, and are therefore not entitled thereafter to object

(b) In the case of *Thomson's Trs. v. Robb*, 10 July 1851, 13 D. 1326, 2½ per cent. was held a reasonable allowance to a factor, the cash transactions of the trust being neither numerous nor complicated. See also *Willis v. Kibble*, 9 July 1839, 1 Beavan, 559.

(c) *Auld v. Orr's Trs.*, 13 Dec. 1851, 14 D. 181.

(d) *Harbin v. Darby*, 22 May 1860, 28 Beavan, 325.

(e) *Scott v. Handyside's Trs.*, 30 March 1868, 6 Macph. 753. See also opinion of Lord Neaves in *Aitken v. Hunter*, 24 May 1871, 9 Macph. 756; and *Lyon v. Baker*, 30 June 1852, 5 De Gex & Smale, 622.

(g) *Lauder v. Millars*, 15 July 1859, 21 D. 1353; *Moore v. Frowd*, 15 Aug. 1837, 3 Mylne & Craig, 45; *Stanes v. Parker*, 23 March 1846, 9 Beavan, 385; *Todd v. Wilson*, 15 July 1846, 9 Beavan.

(h) *Ayliffe v. Murray*, 27 Oct. 1740, 2 Atkyns, 58; *Barrett v. Hartley*, 2 May 1866, 2 Law Reports, Equity, 789.

that such charges are illegal.(i) But in order to found the plea of acquiescence, the circumstances must be sufficient to raise an inference of the beneficiaries' knowledge of the rule of law, that trustees are not entitled to make any profit out of the trust-estate.(k) Any such inference is excluded in the case of pupils or other incapacitated persons, or of creditors who have nothing to do with the management of the trust.(l) In the case of *Lord Gray and others*,(m) the consent and approval of an heir of entail in possession, were, in the following circumstances, held not sufficient to entitle a trustee to payment of his business account. The trustees had obtained a private Act of Parliament, which *inter alia* authorised them to borrow money on the entailed estate for the expense of obtaining and carrying the Act into execution, and directed the Court of Session to ascertain and fix the amount of the expenses. An application was accordingly presented by the trustees to the Court, to fix the amount of the expenses and to order payment thereof. But a decided majority of the whole Court refused to pass the accounts of the trustees, and opinions were expressed to the effect that even the consent of all the existing substitute heirs of entail could not relieve the Court of the duty of examining the accounts on the legal principles applicable to trustees. In an English case, in which the costs of all the parties had been ordered to be paid out of the trust-estate, it having appeared that a trustee had conducted his defence by his partner, all his costs but those out of pocket were disallowed, although no objection

(i) *Cullen v. Baillie*, 20 Feb. 1846, 8 D. 511, affirmed 19 June 1855, 18 D. (H. L.) 40, and 2 Macq. 80; *Ommaney v. Smith*, 3 March 1854, 16 D. 727; *Hope v. Hope*, 12 Feb. 1856, 18 D. 585; *Dixon v. Rutherford*, 11 Nov. 1863, 2 Macph. 61; *Scott v. Handyside's Trs.*, 30 March 1868, 6 Macph. 753.

(k) *Lauder v. Millars*, 15 July 1859, 21 D. 1353.

(l) *Per* Lord Deas, delivering the opinion of the Court, in *Scott v. Handyside's Trs.*, 30 March 1868, 6 Macph. 753. See also opinion of Lord Neaves in *Aitken v. Hunter*, 24 May 1871, 9 Macph. 756; and *Lauder v. Millars*, *supra* (k).

(m) *Lord Gray and others v. Dundas & Wilson*, 21 June 1856, reported under date 12 Nov. 1856, 19 D. 1.

was stated by any of the other parties some of whom, however, were infants.(n)

Effect of
accounts
being settled
between
trustees and
benefi-
ciaries.

12. Even when accounts have been docqueted as correct by a party ignorant of the legal rule prohibiting trustees from making any profit out of the trust-estate, he is entitled to open up the accounts as regards the objectionable items.(o) In England it has been held that a settlement of accounts between a trustee and a *cestui que trust* (a beneficiary) does not bar the latter from opening up the accounts as regards professional charges, &c., if he has had no independent legal assistance, and the trustee has not informed him that he was not liable to pay such charges, on account of their being struck at by the legal rule;(p) but that, on the other hand, if he has had independent legal assistance, he is bound by a settlement or release.(q)

(n) *Lyon v. Baker*, 30 June 1852, 5 De Gex & Smale, 622.

(o) *Lauder v. Millars*, 15 July 1859, 21 D. 1353.

(p) *Todd v. Wilson*, 15 July 1846, 9 Beavan, 486. See also *Gomley v. Wood*, 1 June 1846, 9 Irish Equity Reports, 418; and *Barrett v. Hartley*, 2 May 1866, 2 Law Reports, Equity, 789.

(q) *Stanes v. Parker*, 23 March 1846, 9 Beavan, 385; *In re Wyche*, 15 June 1848, 11 Beavan, 209; Lewin on Trusts, 5th edition, 447.

CHAPTER XX.

LIABILITY OF LAW AGENTS ON UNDERTAKINGS
AND CONTRACTS.

1. It may be stated as a general rule that law agents are not personally liable for obligations which they undertake in name and on behalf of their clients, provided they do not exceed their authority express or implied. (a)

2. A law agent is, however, liable to persons whom he employs on his own credit, such as clerks and printers. (b) He is also primarily liable for such fees and charges as are generally disbursed by legal practitioners, for example, fees of officers of court, (c) fees of advocates' clerks, (d) and the expenses of witnesses and havers adduced by him; (e) and

Law agents
not gener-
ally liable
on under-
takings in
name of
clients.

Law agents
liable to
persons em-
ployed on
their own
credit.

(a) *Rankin v. Mollison*, 17 Feb. 1738, M. 4064; *Maxton v. M'Intosh's* Cra. 4 March 1777, 5 Br. Sup. 441; *King v. Shirra*, 23 Jan. 1827, 5 S. 231 (N. E. 215); *Russel & Aitken v. M'Farlane*, 23 May 1837, 15 S. 989; *Pothier, Traité du Contrat de Mandat*, § 87; *Russell v. Reece*, 1847, 2 Carington & Kirwan, 669; *Lewis v. Nicholson*, 7 May 1852, 18 Adolphus & Ellis, Queen's Bench, 503; *Story on Agency*, chapter 10.

(b) *Neill & Co. v. Hopkirk*, 31 Jan. 1850, 12 D. 618. See also opinion of Lord Justice-Clerk Boyle in *D. of Queensberry's Exrs. v. Tait*, 3 March 1827, 5 S. 521 (N. E. 490). See also *Story on Agency*, § 288.

(c) *Shand's Practice*, p. 408. In England a sheriff cannot sue an attorney for his fees (*Chitty on Contracts*, 9th edition, p. 544); but an attorney is liable to bailiffs and sheriff's officers employed by him; *Addison on Contracts*, 6th edition, p. 585.

(d) *Craig v. Campbell*, 26 Jan. 1858, 20 D. 444; *Fortune's Exrs. v. Smith*, 31 Mar. 1864, 2 Macph. 1005.

(e) A.S. 21 Dec. 1765; *Mason*, 8 Jan. 1830, 5 Mur. 129; *Jamieson v. Main*, 12 Feb. 1830, 5 Mur. 127; *Megget & Roy v. Douglas*, 20 May 1830, 8 S. 779; *M'Donald v. Meldrum*, 8 March 1839, 1 D. 677; A.S. 10 July

for the last of these he may be apprehended on a summary warrant, and imprisoned till payment thereof. (g) Moreover, when proof is taken by commission, or a commission and diligence is granted for the recovery of documents, the agent on whose requisition the commissioner has acted is personally liable for the fees of the commissioner and his clerk. (h) Where a conjunct probation has been allowed, one of the parties paying the whole of the commissioner's fee is entitled to decree against the agent of the other party for his half of the amount. (i)

Not now
liable to
parties to
whom
remit is
made by
the Court.

3. When a cause had been remitted to an accountant, the agents for the parties were formerly held liable conjunctly and severally in payment of his fees. (k) But by an Act of Sederunt applicable to causes in the Court of Session, it is declared "that the agent is not, without special agreement, to be held personally responsible to an accountant, engineer, or other reporter, to whom a remit may hereafter be made by the Court on matter of fact in a depending process, where the agent has authority to bind the party." (l) And by another Act of Sederunt applicable to processes in the sheriff-courts it is provided that the sheriff may remit to

1839, §§ 74 and 136. In England an attorney is not personally liable for the expenses of a witness unless he has entered into an express contract to that effect, or there are circumstances from which such a contract may be inferred; *Robins v. Bridge*, 1836, 3 Meeson & Welsby, 114; *Lee v. Everest*, 18 June 1857, 26 Law Journal, Exchequer, 334; Chitty on Contracts, 9th edition, 546.

(g) *Feuars and Merchants of Fraserburgh v. Lord Saltoun*, 19 June 1707, M. 16,712; *M'Donald v. Meldrum*, 8 March 1839, 1 D. 677.

(h) A. B., 18 Nov. 1843, 6 D. 95; *M'Lachlan v. Flowerdew*, 10 July 1851, 13 D. 1345. The latter was an action in the Court of Session by a commissioner who had taken the proof in several inferior court processes, some of which, however, had reached the Court of Session; and it was held that although in general the proper course was to apply to the judge before whom the causes in question were tried, yet that in the circumstances an action for payment of the fees was competent in the Court of Session.

(i) A. B. *supra* (h).

(k) *Milne v. M'Lean*, 31 May 1825, 4 S. 45 (N. E. 46); *Scott v. Robertson*, 25 June 1829, 7 S. 796.

(l) A.S. 19 Dec. 1835.

accountants, auditors, inspectors, or other persons of skill, to report, and to prepare and lodge plans, where necessary, and that the expense of such remits and reports shall, in the first instance, be paid by the parties' procurators jointly, unless the sheriff shall in particular cases see reason to order otherwise; but that the expense of accountants' reports shall not be chargeable against the agent, unless so arranged, and that the fees of auditing shall in the first instance be paid by the party whose account is taxed.(m) As these Acts of Sederunt refer only to judicial proceedings, an accountant extrajudicially employed by an agent for behoof of a client is still entitled to look to the agent for payment of his fees.(n) An accountant has, moreover, been held entitled to retain his report, and the documents put into his hands to enable him to prepare it, until his fees have been paid;(o) but a party paying the whole expense of a judicial remit to an accountant does not thereby acquire an assignation to the accountant's lien over his report, and has no right to refuse to produce the report in process until the other party shall have paid his proportion of the expense.(p)

4. A law agent who enters into a contract or agreement in his own name binds himself personally, though his client is of course bound to relieve him of all obligations properly undertaken on his behalf.(q) "It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal."(r) Personal liability, moreover,

Contract in
agent's own
name.

(m) A.S. 10 July 1839, §§ 88 and 90.

(n) Hutcheon v. Scott, 26 Feb. 1831, 9 S. 511; Scott v. Marshall, 10 Dec. 1847, 10 D. 226.

(o) Stewart v. Stevenson, 23 Feb. 1828, 6 S. 591. See also Bruce v. Edinburgh Trustees, 7 Feb. 1835, 13 S. 437.

(p) M'Queen v. M'Queen's Trs., 17 Jan. 1851, 13 D. 502.

(q) Gordon's Trs. v. E. of Fife's Exrs. 5 Feb. 1862, 34 Jur. 232. See also Pothier, Traité du Contrat de Mandat, § 80; and Story on Agency, § 269 *et seq.*

(r) Smith's Leading Cases, 6th edition, p. 344. See also Bell's Com.

is naturally implied in a bill transaction.^(s) Thus, where a bill addressed "to George Todd Chiene, Esquire, Factor of Islay," for £1500, "value in account with W. F. Campbell, Esquire of Islay," had been accepted "G. T. Chiene," it was held, in a question with an indorsee, that this acceptance was the individual acceptance of the factor, and that he was therefore personally liable.^(t) In another case, a competition having arisen for the office of trustee in a sequestration, in consequence of which the agent of one of the competitors entered into negotiations for the purchase of the claim of another party, and missive letters passed between the agent and the proposed seller, in which the terms of the agreement were distinctly set forth, and no reference was made to the previous communings or to the agent's client; the Court held that the agent was personally liable under the missives, and that it was incompetent to refer to previous or subsequent correspondence for the purpose of proving that he was understood to be acting for another party.^(u) Again, where an agent had entered into a contract in his own name for the purchase of heritable property, he was held personally bound to pay the price, although it was quite well known to the seller that the purchase was for behoof of a company of which the agent was secretary.^(x) It may be here observed, that when a law agent buys an estate, or other property, in his own name, and the question is raised between him and a client whether

vol. i. (M'Laren's edition), p. 540, *note*. Where an English solicitor wrote:—"I am ready, and hereby offer, to allow and pay the costs" of certain proceedings, he was held personally liable on this undertaking; *Ex parte Bentley*, 23 Feb. 1833, 2 Deacon & Chitty, 578.

^(s) Thomson on Bills, Dove Wilson's edition, pp. 152 and 181.

^(t) *Chiene v. Western Bank*, 20 July 1848, 10 D. 1523. See also *Ainslie v. Arbuthnot & Co.*, 18 Dec. 1739, M. 4065, and 7 Feb. 1743, 1 Pat. App. 340, and *Story on Agency*, § 159.

^(u) *Edinburgh & Glasgow Bank v. Steele*, 17 Feb. 1853, 25 Jur. 245, and 2 Stuart, 227. See also *Lewis v. Nicholson*, 7 May 1852, 18 Adolphus & Ellis, Queen's Bench, 503, as to reference to correspondence being incompetent in such circumstances.

^(x) *Sorley's Trs. v. Grahame*, 14 Feb. 1832, 10 S. 319. See also *Saxon v. Blake*, 16 April 1861, 23 Beavan, 438.

he bought it for himself or for the client, the question is not regarded as one of trust falling under the statute 1696, c. 25, but of mandate, which may be proved *prout de jure*.(y)

5. A law agent purchasing property at a public roup, and declaring that he makes the purchase on behalf of a client, whom he binds to fulfil the articles and conditions of sale, is personally liable to implement them, or to pay damages, if he makes the purchase substantially for his own benefit, or in the knowledge that his client is wholly unable to fulfil his obligation as purchaser, or if he undertakes to become cautioner for payment of the price.(z)

Purchase at public roup on behalf of client.

6. "There is no doubt that a person who enters into a contract, which is expressed to be made by him for and on behalf of another, may still contract thereby in such terms as to bind himself personally. And accordingly, the question in such cases is whether, looking at the contract as a whole, it appears to have been intended that he should be personally liable thereon."(a) Thus, where the law agents of a debtor wrote to the creditor's agent, stating that they were authorised by one of the debtor's friends, whose name they did not disclose, to offer a dividend of ten shillings per pound, and personal diligence against the debtor was stayed on the faith of this offer, they were held to have rendered themselves personally liable for the amount.(b) In several English cases it has been held not sufficient *per se* to relieve attorneys and solicitors from personal liability that they have contracted as attorneys or solicitors for or "on behalf of"

Liability on contracts entered into on behalf of clients.

(y) *Boswell v. Selkirk*, 9 Mar. 1811, Hume, 350; *Gordon's Trs. v. E. of Fife's Exrs.* 5 Feb. 1862, 34 Jur. 232.

(z) *Thomson v. Dudgeon*, 4 June 1851, 13 D. 1029.

(a) *Chitty on Contracts*, 9th edition, p. 207. See also *Maxton v. M'Intosh's Crs.*, 4 March 1777, 5 Br. Sup. 441; and *Story on Agency*, § 275; and 1 *Bell's Com.* (M'Laren's edition), p. 540.

(b) *Dores v. Horn & Rose*, 12 Feb. 1842, 4 D. 673. See also *In re Hilliard* 1845, 2 *Dowling & Lowndes*, 919; where the attorney of the defendant having given an undertaking to pay the debt sued for, in consequence of which the plaintiff stayed proceedings, the Court enforced the undertaking, although it was void, under the Statute of Frauds, for want of consideration appearing on the face of it.

their clients.(c) But more recently where the solicitors of the assignees of a bankrupt, proposing to sell his effects, wrote in the following terms to the solicitor of a party who claimed part of the effects under a bill of sale, "In consideration of A., for whom you act, consenting to the sale, we hereby on behalf of the assignees consent that the net proceeds of the effects included in the said bill of sale shall be paid over to you or your client," and this offer was accepted; it was held that they had contracted merely as agents, and were not personally liable.(d) Lord Chief-Justice Campbell, referring to previous decisions, observed: "No authority on the construction of a contract can be pre-

(c) Thus, the solicitors of the assignees of a bankrupt tenant were held personally liable to the landlord upon a written undertaking, whereby they, "as solicitors to the assignees," undertook to pay the landlord his rent; *Burrell v. Jones*, 6 Nov. 1819, 3 Barnewall & Alderson, 47. Where the respective attorneys in a cause, which had been withdrawn from trial, signed the following undertaking:—"We, the undersigned attorneys for the above named plaintiff and the above named defendant, do hereby personally consent, undertake, and agree, that the record in this cause shall be withdrawn, &c.; that the costs of the suit on the part of the defendant shall be taxed between the parties on the principle between plaintiff and defendant," &c.; it was held that the plaintiff's attorney was personally liable upon this undertaking to pay to the defendant's attorney the costs when taxed; *Iveson v. Conington*, 28 Jan. 1823, 2 Dowling & Ryland, 307. Again, the attorneys in an action against a parish for not repairing a road, having entered into an agreement, which bore that one of them "agrees on the part of the parish to pay the costs," he was held to be personally liable; *Watson v. Murrel*, 17 March 1824, 1 Carrington & Payne, 307. Similarly, the solicitor of the London creditors of a country bankrupt was held personally liable, upon a letter written by him to the solicitor of the country creditors in the following terms:—"I am willing, on behalf of the London creditors, to bear two-thirds of the expenses of Messrs B. & B., or such barrister as you may think fit, for resisting Mr K.'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th inst. I hereby undertake to bear and pay, on behalf of these creditors, two-thirds of the expenses incident thereto accordingly;" *Hall v. Ashurst*, 1833, 1 Crompton & Meeson, 714. See also *Appleton v. Binks*, 8 May 1804, 5 East, 148; and *Livingston v. Johnson*, 23 Feb. 1830, 8 S. 594.

(d) *Lewis v. Nicholson*, 7 May 1852, 18 Adolphus & Ellis, Queen's Bench, 503.

cisely in point, unless the words of the contracts are the same; but it seems to me that the present contract resembles that in *Downman v. Williams*,^(e) which was held not to be a personal undertaking, but a declaration of agency on behalf of the principals. In *Burrell v. Jones* there were no words to show that the undertaking was on behalf of any one. In *Hall v. Ashurst*, the undertaking was on behalf of the London creditors. And in *Watson v. Murrell* the undertaking was on behalf of the parish. It could not reasonably be intended that the plaintiff should contract with such bodies, and therefore it was apparent on the face of the instrument that the contract must be intended to be personal; but in the present case there is nothing unreasonable in intending that the contract should be with the assignees." This opinion is supported by the last case on the subject, where an attorney was held not personally liable, on an undertaking on behalf of his client, to take up a bill.^(g)

7. A law agent who gives a distinct guarantee for a client is, of course, personally liable.^(h) Thus, a person who had

Liability on
guarantees.

^(e) 22 April 1845, 7 Adolphus & Ellis, Queen's Bench, 103. The defendant, acting as general agent of Messrs Esdaile & Co., entered into negotiations for the purchase of the plaintiff's claims on a bankrupt estate. In the course of these negotiations, the defendant wrote to the plaintiff: "Your bill of charges in this matter, amounting to £527, 5s., I also undertake (on behalf of Messrs Esdaile & Co.) to pay, and will arrange with you the time and mode immediately after the dividend meetings." The Court held that this letter, taken in connection with the correspondence which preceded and gave rise to it, imported only an undertaking by the defendant as agent for Messrs Esdaile & Co. This decision, however, appears to have depended to a considerable extent on specialties of English procedure.

^(g) *Allarway v. Duncan*, 16 April 1867, 16 Law Times, N. S., 264. The attorney wrote the following letter to the creditor:—"Sir, Mr W. has handed me your letter of the 3rd, respecting the non-payment of the bill for £91, due on Saturday. I am now making arrangements for an advance to Mr W., to enable him to pay this and other claims upon him; and if you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up." The creditor had no further communication with the attorney, and on receipt of the letter did not know that he was an attorney.

^(h) *Thomson v. Dudgeon*, 4 June 1851, 13 D. 1029; *Alliance Bank v. Tucker*, 25 June 1867, 17 Law Times, N. S., 13.

entered into a submission, "as acting and taking burden on himself for" another, was held bound to implement the decree-arbitral.⁽ⁱ⁾ And where a debtor had been apprehended on letters of caption proceeding on constituted debts, and at his request an agent granted a holograph letter to the messenger-at-arms in the following terms:—"I hereby become bound for payment of the debts contained in the two captions at the instance of," &c.; it was held that this was an unqualified obligation for payment of a special debt, and that the creditor was entitled to payment without entering into an accounting as to other claims.^(k)

Liability on
unauthorised
contracts.

8. A law agent who acts without authority, or who exceeds the limits of his authority express or implied, does not bind his client, but renders himself personally responsible to third parties for acts done, or contracts made with them, in name or on behalf of his client.^(l) Thus, where an agent entered into a judicial reference, without express authority from his client, and "as agent" bound his client to abide by the award of the arbiter, he was held personally liable in

(i) *Woodside v. Cuthbertson*, 4 Feb. 1848, 10 D. 604. In an English case, where an attorney undertook that his client should enter into a reference, he was held bound to procure his client's signature to an agreement of reference, and to find security for the performance of the award; *Ex parte Hughes*, 31 Jan. 1822, 5 Barnewall & Alderson, 482. But where an attorney undertook to pay the sum which should be awarded against his client in a particular reference, the arbiter who was to make his award within a specified time having failed to do so, and the judge's order for prorogating the time having been made of consent of parties, the attorney acting on that occasion for his client, the Court held him discharged from his undertaking as he had not recognised it after the expiry of the original time for making the award; *Staitt v. Haddon*, 1841, 9 Dowling, 995.

(k) *Gardiner's Executrix v. Bennett*, 28 Nov. 1839, 2 D. 155.

(l) *Maxton v. M'Intosh's Crs.*, 4 March 1777, 5 Br. Sup. 441; *Bank of Scotland v. Watson*, 15 March 1813, 1 Dow's App. 40; *Story on Agency*, § 264; *Smith's Leading Cases*, 6th edition, p. 340; *Chitty on Contracts*, 9th edition, p. 209. See also 1 *Bell's Com. (M'Laren's edition)*, p. 543. It has been held in England incompetent to sue a client for fulfilment of a contract alleged to have been entered into by a solicitor on his behalf, and alternatively the solicitor, in the event of it appearing that he acted without authority; *Clark v. Lord Rivers*, 12 Nov. 1867, 5 Law Reports, Equity, 91.

implement of the award, on his client repudiating the reference as unauthorised.^(m) And a person who had entered into negotiations for a loan of money, without special or written authority from the proposed lenders, was held liable to the intending borrower for the expenses incurred in consequence of the proposed lenders resiling.⁽ⁿ⁾

^(m) *Livingston v. Johnson*, 23 Feb. 1830, 8 S. 594. See also *Ex parte Hughes*, and *Staitt v. Haddon*, *supra* (i).

⁽ⁿ⁾ *Glassford v. Brown*, 1 Dec. 1830, 9 S. 105. See also *post*, p. 300, as to liability for costs of unauthorised legal proceedings.

CHAPTER XXI.

LIABILITIES OF LAW AGENTS TO PERSONS AGAINST WHOM THEY ARE EMPLOYED TO ACT.

General
nature of
duties to
third par-
ties.

1. Law agents are under no obligation to attend to the interests of any persons except their own clients. To third parties they owe no duty but the negative one of abstaining from the commission of actual wrong; and in the discharge of the duties which they owe to their clients, especially in the conduct of judicial proceedings, they necessarily enjoy very considerable immunities and privileges, the nature and extent of which now fall to be considered.

Liability for
delicts.

2. It is a settled principle of law that an agent is responsible to third parties for his own delict, that is to say, for any positive wrong that he may commit; and he cannot escape from this liability by pleading that he acted merely *factorio nomine*.(a) Thus, an agent who takes the law into his own hands, and attempts *via facti* to invert the state of possession, is liable in damages conjunctly and severally with his client.(b) Hence also an agent is responsible to third parties for his own fraudulent or deceitful conduct.(c) Thus, where an agent employed to borrow money misrepresented to the lender the nature of the security to be given by his client, he was held bound to restore the sum advanced by

(a) Story on Agency, chapter 12.

(b) *Paterson v. Walker*, 29 Nov. 1848, 11 D. 167; *Dobbie v. Halbert*, 7 March 1863, 1 Macph. 532.

(c) Cases *infra*; *Andrews v. Hawley*, 26 May 1857, 26 Law Journal, Exchequer, 323; Addison on Torts, chapter 18.

the lender.(d) Even the undue concealment of material circumstances may be regarded as equivalent to fraudulent misrepresentation. In one case, where an agent employed to appear for a party in a submission, in order to recover payment of part of a debt which seemed to be resting owing under certain bonds, succeeded in obtaining a decree-arbitral in his client's favour, but was thereafter informed that the debt had been previously fully paid up, notwithstanding which he took payment of the amount from the debtor, who was ignorant of the fact; the Court of Session held that the agent was liable in repetition to the party from whom he had recovered payment.(e) This judgment was reversed by the House of Lords, but solely on the ground that the decree-arbitral remained unreduced and had been declared by the Court not subject to reduction.(g) In another case, the circumstances of which were somewhat special, the law agents of a judicial factor, who had never found caution or obtained an extract of his appointment, were held bound, in respect they had not revealed the defective state of the factor's title, to relieve certain trustees who had been found liable in repayment to the beneficiaries of funds paid by them to the judicial factor on the faith of his appointment.(h)

3. A law agent employed to settle with the creditors of an insolvent client, may sometimes occupy the position of a trustee in a sequestration, and be responsible to contingent creditors for paying away all his client's money, without regard to their claims. Thus, where the factor and the confidential agent of an insolvent person abroad were directed by him to apply a certain remittance, sufficient only to pay

Liability for
paying
away insol-
vent client's
money
*primo veni-
enti.*

(d) *Brown v. Cuthill*, 28 March 1828, 4 Mur. 474; *Haldane v. Donaldson*, 3 March 1836, 14 S. 610, affirmed 3 Aug. 1840, 1 Rob. 226. Such a misrepresentation is, however, not a sufficient ground for an action of damages, unless damage has been actually sustained; *Martin v. Goldie*, 27 June 1834, 12 S. 830. See also *Whitmore v. Mackeson*, 29 May 1852, 16 Beavan, 126.

(e) *Keith v. Taylor*, 8 June 1821, 1 S. 55 (N. E. 57).

(g) 4 June 1824, 2 S. App. 252.

(h) *M'Farlane v. Donaldson*, 12 May 1835, 13 S. 725. The judicial factor was himself a partner of the law agents referred to, and his accounts were not kept separate from those of the company. See also *Bogle v. Cameron*, 16 Feb. 1844, 6 D. 682.

a dividend on his debts, in payment of all outstanding bills, and they paid away the whole amount, without reserving a dividend to meet a contingent claim of which they were aware, and took a guarantee from those creditors to whom they paid dividends; the Court held that the agent and the factor ought to have set apart a sum to answer the contingent claim, and that they were therefore responsible to the creditor for such an amount.⁽ⁱ⁾

Law agents
not liable
for conduct-
ing un-
founded liti-
gation.

4. By our early law, an advocate was obliged before pleading any cause to give his oath of calumny, *i.e.*, that he believed that the cause was just, and that his client did not calumniously insist in affirming or denying the matter of fact in issue.^(k) This practice has, however, long since gone into desuetude;^(l) and it need scarcely be said that at the present day neither an advocate nor a law agent is responsible for the justice of his clients' causes. There is, indeed, no Scotch case in which it has been sought to subject an agent in damages for merely conducting, on the instructions of a client, judicial proceedings which have turned out to be unfounded.^(m) It has even been held in England that an action cannot be maintained against an attorney who, being retained to sue a person for a debt, by mistake and without malice, takes all the proceedings to judgment and execution against another person of the same name.⁽ⁿ⁾ This

⁽ⁱ⁾ *Allan v. Marquis*, 23 Feb. 1828, 6 S. 595. See also *Swan v. Jeffrey*, 15 Jan. 1829, 7 S. 268.

^(k) 1429 c. 125; *Bankton*, iv. 3. 11; *Stair*, iv. 44. 18; *Houston v. Schaw*, 20 April 1726, *Robertson*, 561. See also *Pierce v. Blake*, 1697, 2 *Salkeld*, 515, as to the early practice in England.

^(l) *Macqueen*, 20 Dec. 1764, 5 Br. Sup. 902.

^(m) Reference may be made to the cases, settling that a litigant is not liable in damages to his opponent for judicial proceedings taken without malice or fraud. See *Guthrie Smith on Reparation*, p. 295; *Graham v. Dundas*, 9 July 1829, 7 S. 876; *Clelland v. Laurie*, 21 June 1848, 10 D. 1372; *Fairbairn v. A. B.*, 17 Dec. 1835, 14 S. 178; *Gardner v. Martin*, 10 June 1864, 2 Macph. 1183; *Ormiston v. Redpath*, 24 Feb. 1866, 4 Macph. 488; *Davies & Co. v. Brown & Lyell*, 8 June 1867, 5 Macph. 842.

⁽ⁿ⁾ *Davies v. Jenkins*, 12 June 1843, 11 Meeson & Welsby, 745. See also *Carrat v. Morley*, 25 May 1841, 1 Adolphus & Ellis, Queen's Bench, 18. There is a Scotch case in which an agent was subjected in damages

immunity extends to the taking of regular proceedings in a competent court, although they should be ultimately set aside on the ground of judicial error;(o) but it appears to be otherwise if the proceedings are set aside on the ground of irregularity or informality.(p)

5. As law agents are amenable to the summary jurisdiction of the courts in which they practice, they may be found personally liable in the expenses of processes, which they have been employed to conduct, by way of punishment for misconduct or neglect of duty. Thus, where the agent of objecting creditors in a process of *cessio* failed to attend a diet of examination, owing to his having mistaken the hour, in consequence of which the pursuer got decree in absence, the Court reponed the creditors, on condition of their agent being personally liable to the pursuers in the expenses occasioned by his neglect.(q) In England, if a plaintiff's suit is so frivolous and vexatious that it could not have been raised in expectation of a favourable decree, the Court will compel his solicitor to pay the taxed costs of the defendant;(r) but

Law agents may be found liable in the expenses of process occasioned through their fault.

for executing diligence against a son on a bill accepted by a father of the same name; but in the opinion of the presiding judge the question of his liability depended on whether he had probable cause for his conduct; *Hamilton v. Anderson*, 19 July 1830, 5 Mur. 312.

(o) *Aitken v. Finlay*, 25 Feb. 1837, 15 S. 683; *Bell v. Gunn*, 21 June 1859, 21 D. 1009; Addison on the Law of Torts, 4th edition, p. 596; *Williams v. Smith*, 2 June 1863, 14 Scott, Common Bench, N. S., 596.

(p) *Bisset v. Whitson*, 27 July 1842, 5 D. 5; *Snare v. Lord Fife's Trs.*, 10 Dec. 1850, 13 D. 286, 17 Jan. 1852, 14 D. 332, and 19 June 1852, 24 Jur. 539; *Wilson v. Alexander*, 23 July 1846, 9 D. 7; *Smith v. Grant*, 5 June 1858, 20 D. 1077; *Frame & Co. v. Campbell and Hart & Hodge*, 9 June 1836, 14 S. 914, affirmed 18 June 1839, M'L. & Rob. 401. See also *Codrington v. Lloyd*, 1 June 1839, 8 Adolphus & Ellis, 449; *Loton v. Devereux*, 31 Jan. 1832, 3 Barnewall & Adolphus, 343; and Addison on the Law of Torts, 4th ed., pp. 596 and 671.

(q) *M'Kechnie v. Halliday*, 23 Feb. 1856, 18 D. 659. See also *Meggs v. Binns*, 21 April 1836, 3 Scott, Common Bench, 52; *In re Bolton*, 21 Jan. 1846, 9 Beavan, 272; and *Ridley v. Tiplady*, 27 Jan. 1855, 20 Beavan, 44.

(r) *Cockle v. Whiting*, 20 Nov. 1829, 1 Russell & Mylne, 43. Lord Bankton (iv. 3. 13) observes, that an advocate ought to desert a cause when he discovers that it is unjust or calumnious; and an advocate has been censured by the House of Lords for signing an appeal brought for the sole purpose of delay; *Gilchrist v. M'Adam*, 5 March 1798, 4 Pat. App. 26.

this liability does not attach to a solicitor who has not been concerned in the original institution of the suit.(s) Where it appears that the same attorney has been employed in a cause on both sides, the Court will set aside the proceedings, and order the attorney to pay the costs.(t)

Liability for
the costs of
unauthor-
ised pro-
ceedings.

6. A law agent who raises or conducts legal proceedings in the name of another person, without that person's authority, is personally liable to the opposite party in the expenses of process, even where he, the agent, has acted *in bona fide*.(u) Moreover, when the party in whose name the proceedings are taken is not within Scotland, verbal authority is insufficient.(x) A practitioner in the sheriff-court does not necessarily incur any liability by failing to produce a written mandate. But in one case, where a decree for expenses obtained in the sheriff-court was suspended on the ground that the agent had no authority, the agent having declined either to sist himself in the suspension or

(s) *Fielden v. Northern Railway of Buenos Ayres Railway Co.*, 14 Dec. 1870, 40 Law Journal, Chancery, 113. See also *Weston v. Beeman*, 21 Nov. 1857, 27 Law Journal, Exchequer, 57.

(t) *Berry v. Jenkins*, 11 Feb. 1826, 11 Moore, 308. See also *Regina v. Alderson*, 2 Nov. 1839, 11 Adolphus & Ellis, 3.

(u) *Noble v. Magistrates of Inverness*, 8 Feb. 1825, 3 S. 516 (N.E. 358); *Cowan v. Fairnie*, 4 March 1836, 14 S. 634; *Robertson v. Ross & Douglas*, 16 July 1873, not yet reported. The same rule is adopted in England; *Lush's Practice*, 3d edition, p. 256; *Wright v. Castle*, 14 June 1817, 3 Merivale, 12; *Dupen v. Keeling*, 5 Dec. 1829, 4 Carrington & Payne, 102; *Allen v. Bone*, 11 Dec. 1841, 4 Beavan, 493 (where it was held that the costs must be taxed as between solicitor and client); *Freeman v. Fairlie*, 20 Nov. 1838, 8 Law Journal, Chancery, 44 (in which proceedings had been carried on by a solicitor after his authority had been revoked); *Hubbart v. Phillips*, 31 Jan. 1845, 13 Meeson & Welsby, 702; *Hoskin v. Phillips*, 10 June 1847, 16 Law Journal, Queen's Bench, 339 (where the proceedings had been taken in the name of a non-existing person); *Malins v. Greenaway*, 24 Nov. 1847, 10 Beavan, 564 (where the client had died); *Jenkins v. Fereday*, 5 June 1872, 7 Law Reports, Common Pleas, 358 (where it was held that in such cases an attorney's liability for the costs is a liability incurred by means of fraud within the 49th section of the Bankruptcy Act of 1869).

(x) *Baillie v. Abercromby*, 5 July 1796, Hume, 492; *Kyd v. Ferguson*, 11 March 1826, 4 S. 549 (N.E. 557). See also *ante*, p. 79.

to produce his mandate, and having refused all information as to his authority, he was held bound to relieve the charger of the expenses both of the original action and of the suspension.(y)

7. As an insane person is incapable of giving authority, either to raise(z) or to defend an action,(a) a law agent who takes legal proceedings in name of an insane client is regarded as acting without authority, and is consequently liable in expenses to the opposite party.(b) The Court will, however, show the greatest tenderness to an agent who forms a more sanguine opinion of a client's sanity and capacity than the circumstances actually justify, provided he is actuated solely by the desire to protect the interests of his client.(c)

Liability for taking proceedings in name of person who is insane.

8. An agent who has taken legal proceedings without authority is not only liable in expenses, but may even be subjected in damages to the opposite party,(d) where damage has been actually occasioned by the agent's unauthorised proceed-

Liability for damages caused by unauthorised proceedings.

(y) *Phillip v. Gordon*, 5 Dec. 1848, 11 D. 175.

(z) *Reid v. Duff*, 19 Jan. 1839, 1 D. 400.

(a) *Lindsay v. Watson*, 14 June 1843, 5 D. 1194.

(b) *Bryce v. Graham*, 26 May 1826, 2 W. & S. 481, and 23 July 1828, 3 W. & S. 323; *M'Call v. Sharp*, 31 Jan. 1862, 24 D. 393.

(c) *M'Call v. Sharp*, *supra* (b). In this case a petition for the appointment of a *curator bonis* to an old man, alleged to have become imbecile, was opposed at first by his natural daughter, with whom he resided, and afterwards by her agent in name of the old man, from whom a mandate was obtained. The application was ultimately granted, and the Court held, by a majority, that in the circumstances of the case the agent was not justified in opposing the petition in name of the old man, and accordingly found him liable in the expenses which he had thereby occasioned to the petitioners. Lord Justice-Clerk Inglis, however, dissented; and the decision of the majority was founded on the opinion that the agent's motive was not the protection of the old man's interests.

(d) *Miller & Baird v. Rae*, 17 July 1834, 13 S. 699. See also *Andrews v. Hawley*, 26 May 1857, 26 Law Journal, Exchequer, 323, where an action of damages was held to be maintainable against an attorney who had sued for and obtained payment of debts due to the plaintiff, acting on the instructions of a third party who falsely claimed to be the plaintiff's partner.

ings.(e) It seems, however, to be a good defence that he acted under a forged mandate which he *bona fide* believed to be genuine;(g) though this has been held in England to be insufficient to exempt an attorney from liability for the costs of unauthorised proceedings.(h)

Liability for costs where agent is *dominus litis*.

9. If a law agent is the true *dominus litis*—i.e., if he has a direct interest in the subject-matter of the dispute, and through such interest a proper control over the proceedings in the action—he may be compelled to sist himself as a party, and thus, in the event of his being unsuccessful, be held liable in expenses to the opposite party.(i) Thus, the Court in one case refused to entertain an appeal in name of a party on the poor's-roll against an interlocutor repelling certain objections to the modification and taxation of expenses to which he had been found entitled, unless his agent would sist himself as a party.(k) Apparently, however, an agent will not be regarded as the *dominus litis* merely because he has taken from his client an assignation of his claim and action, in security of debts incurred or to be incurred to him by his client,(l) unless perhaps in the event of the debts exceeding the value of the claim assigned.(m) An agent appointed tutor *ad litem* is not liable in expenses of process.(n)

(e) *Cotterell v. Jones*, 25 Nov. 1851, 11 Scott, Common Bench, 713.

(g) *Miller & Baird v. Rae*, *supra* (d).

(h) *Davies v. Eyton*, 7 June 1832, 3 Barnewall & Adolphus, 785. See also *Robson v. Eaton*, 1785, 1 Durnford & East, 62.

(i) *Fraser v. Dunbar*, 6 June 1839, 1 D. 882; *Matheson v. Thomson*, 8 Nov. 1853, 16 D. 19. See also *M'Innes v. M'Coll*, 3 June 1813, 17 F.C. 337. It has been held in England that a solicitor who, in order to induce a plaintiff to go on with a suit, agrees to indemnify him against the costs, thereby makes the suit his own, and becomes liable to pay the costs of the opposite party; *Cockle v. Whiting*, 20 Nov. 1829 1 Russell & Mylne, 43; *Fielden v. N. Railway of Buenos Ayres Co.*, 14 Dec. 1870, 40 Law Journal, Chancery, 113; and 6 Law Reports, Chancery Appeals, 497. See also *Hilton v. Woods*, 28 June 1867, 4 Law Reports, Equity, 432.

(k) *Macdougall v. Clark*, 5 June 1852, 1 Stuart, 796.

(l) *Fraser v. Dunbar*, *supra* (i).

(m) *Walker v. Wedderspoon*, 23 March 1843, 2 Bell's App. 57.

(n) *Fraser v. Pattie*, 9 March 1847, 9 D. 903.

10. A litigant using any legal right or remedy to which he is absolutely entitled, and which he may avail himself of without applying for a special warrant, is not liable for the consequences of its use, unless he has resorted to it maliciously, and without probable cause.^(o) Hence the pursuer of an action is entitled to use arrestment^(p) and inhibition on the dependence, without being liable in damages merely because he fails in obtaining judgment against the defender;^(q) and his agent is similarly protected, unless he has acted maliciously and without probable cause.^(r) In one case, however, where inhibition was used by an agent nimiously and oppressively, without a written mandate from his client, who was furth of Scotland, the Court recalled it, and found the agent, as well as the client, liable in expenses.^(s)

Neither client nor agent liable for using arrestments or inhibition.

11. On the other hand, where a party applies to the Court for some special diligence or remedy, which is granted only on the faith of his statement, as in the cases of interdicts,^(t)

Liability for use of remedies which are granted only on faith of party's statement.

(o) *Per* Lord Justice-Clerk Inglis in *Wolthecker v. Northern Agricultural Co.*, 20 Dec. 1862, 1 Macph. 211. See also note of Lord Jeffrey in *Swayne v. Fife Banking Co.*, 27 June 1835, 13 S. 1003.

(p) *Brodie v. Young*, 19 Feb. 1851, 13 D. 737; *Henning v. Hewetson*, 12 Feb. and 22 July 1852, 14 D. 487 and 1084; *Wolthecker v. Northern Agricultural Co.*, *supra* (o).

(q) *Per* Lord Justice-Clerk Inglis in *Wolthecker v. Northern Agricultural Co.*, *supra* (o). Inhibition is not competent on a decree obtained under the Small Debt Act, 7 Will. IV. and 1 Vict. c. 41, or under the Debts Recovery Act, 30 and 31 Vict. c. 96; *Lamont*, 5 Dec. 1867, 6 Macph. 84.

(r) *Lord Duffus v. Davidson & Clyne*, 17 July 1828, 4 Mur. 558; *Baillie v. Hume & Adamson*, 8 Dec. 1853, 16 D. 161. A general averment of malice and want of probable cause is sufficient without a statement of the facts and circumstances by which they are to be established. It has been held in England that an attorney having acted on counsel's opinion is not a sufficient defence to an action of damages for a malicious or fraudulent proceeding, unless the case was fairly stated to counsel, the opinion obtained *in bona fide*, and the advice properly pursued; *Andrews v. Hawley*, 26 May 1857, 26 Law Journal, Exchequer, 323.

(s) *Kyd v. Ferguson*, 11 March 1826, 4 S. 549 (N. E. 557). See also *E. of Caithness*, 5 July 1836, 14 S. 1091.

(t) *Roberts v. E. of Rosebery*, 7 Dec. 1825, 4 Mur. 1; *Moir v. Hunter*, 16 Nov. 1832, 11 S. 32; *Lord Elibank v. Renton*, 15 Jan. 1833, 11 S. 238; *Reid v. Bruce*, 11 July 1855, 17 D. 1100; *Gilmour & Anderson v. Gil-*

landlords' sequestrations, (u) and warrants against parties *in meditatione fugæ*, (x) he is answerable for the consequences if his statement, though made in good faith, is inconsistent with fact and unjustifiable. (y) Such applications are granted *periculo petentis*; and in an action of damages against the applicant, the pursuer is not bound to aver or put in issue malice and want of probable cause. (z) The agent of the applicant may also be subjected in damages if there is any irregularity in the proceedings, (a) or if the application has been granted on his unjustifiable personal representations. (b) Where, however, a law agent, acting as mandatory for an alleged creditor who resided in England, deponed that what was contained in a petition for a *meditatio fugæ* warrant was truth to the best of his knowledge and belief, and that, from the information which he had received from his employer, he believed that the party against whom the petition was presented was *in meditatione fugæ*, he was held not liable in damages, on its being ultimately found that no debt was actually due to his employer. (c)

christ, 20 June 1857, 29 Jur. 411; Abel's Exrs. v. Edmonds, 10 July 1863, 1 Macph. 1061; Robinson v. North British Railway Co., 10 March 1864, 2 Macph. 841; Miller v. Hunter, 23 March 1865, 3 Macph. 740.

(u) M'Leod v. M'Leod, 11 Feb. 1829, 7 S. 396; Oswald v. Graeme, 26 June 1851, 13 D. 1229; Robertson v. Galbraith, 16 July 1857, 19 D. 1016.

(x) Swayne v. Fife Banking Co., 27 June 1835, 13 S. 1003; Carne v. Manuel, 28 June 1851, 13 D. 1253; Ford v. Muirhead, 19 May 1858, 20 D. 949.

(y) *Per* Lord Justice-Clerk Inglis in Wolthecker v. Northern Agricultural Co., 20 Dec. 1862, 1 Macph. 211.

(z) Gilmour & Anderson v. Gilchrist, 20 June 1857, 29 Jur. 411; Ford v. Muirhead, 19 May 1858, 20 D. 949; Abel's Exrs. v. Edmonds, 10 July 1863, 1 Macph. 1061; Robinson v. North British Rail. Co., 10 March 1864, 2 Macph. 841; Maclean v. Colthart, 14 March 1865, 3 Macph. 719.

(a) Cowan v. Watt, 12 July 1833, 11 S. 999; M'Gill v. Ferrier, 17 March 1837, 15 S. 882; Carne v. Manuel, 28 June 1851, 13 D. 1253. See also Williams v. Smith, 2 June 1863, 14 Scott, Common Bench, N. S., 596.

(b) Anderson v. Ormiston & Lorain, 3 Jan. 1750, M. 13,949, and 13,955. See also Jowett v. Wooley, 8 July 1797, Hume, 403.

(c) Cameron v. Russell, 13 Dec. 1821, 1 S. 211 (N. E. 200), 20 F.C. 498. See also Scudamore v. Lechmere, 3 June 1797, M. 8559; Jowett v. Woolley,

12. An application for a process caption is granted *periculo petentis*; and if the caption is wrongfully executed, both the agent applying for it and his client are liable, conjunctly and severally, in damages.^(d) But only nominal damages, or even none at all, will be awarded, where the party incarcerated has been himself partly to blame for the caption being executed.^(e)

Liability for use of process caption.

13. In an action of damages for wrongous confinement in a lunatic asylum, it was held that the law agent of the family of the alleged lunatic, who had been instrumental in carrying out the proceedings in the name of the mother, was not privileged, and that the pursuer was therefore not bound to put in issue whether the agent had acted maliciously and without probable cause.^(g)

Liability for wrongous confinement in a lunatic asylum.

14. A law agent employed to raise and execute diligence against the goods or person of a debtor requires to proceed with the greatest caution and the utmost regularity; for if the diligence is not strictly legal, he, as well as his employer,^(h) may be found directly liable in reparation to the

Liability for the wrongous use of diligence.

8 July 1797, Hume, 403; Tasker v. Mercer, 4 March 1801, M. Appx. *Meditatio Fugæ*, No. 1; Hobson v. Forbes, 22 Jan. 1814, Hume, 408; Anderson v. Smith, 26 Nov. 1814, 18 F.C. 51; and Kerslake v. Clarke, July 1820; More's Notes to Stair, p. 6.

^(d) Pearson v. Anderson, 18 July 1833, 11 S. 1008; Menzies v. Stevenson & Co., 27 Dec. 1839, Macfarlane's Reports of Jury Trials, 281; Hunter v. Kerr, 28 March 1842, 4 D. 1175. As to the liability of sheriff-clerks for improperly issuing process captions, see Watt v. Thomson, 8 July 1868, 6 Macph. 1112, 24 May 1870, 8 Macph. (H. L.) 77, 27 Oct. 1871, 9 Scot. Law Rep. 20. See also Dunlop v. Hay, 14 Nov. 1822, 2 S. 11 (N. E. 9); and Horne v. Steele, 18 Feb. 1825, 3 S. 550 (N. E. 380).

^(e) Pearson v. Anderson, *supra*; Menzies v. Stevenson & Co., *supra*; Scott v. Curle, 18 Jan. 1840, 2 D. 348, affirmed 8 June 1841, 2 Rob. 317.

^(g) Mackintosh v. Fraser, 19 March 1859, 21 D. 783. The agent was ultimately assoilzied in the circumstances of the case; 20 Jan. 1860, 22 D. 421. See also Strang v. Strang, 19 Jan. 1849, 11 D. 378.

^(h) A client is liable in damages, not only for his own wrongful act in authorising diligence to be done where the circumstances do not warrant its use, but also for the misconduct or blunders of agents and officers whom he employs; Gordon's Exrs. v. Dunlop, 13 July 1825, 3 Mur. 516; Dunlop v. Buchanan, 7 Nov. 1828, 5 Mur. 16; Pearson v. Anderson, 18 July 1833, 11 S. 1008; Macdonnell v. Bank of Scotland, 21 July 1834, 13 S.

party injured, (i) and he is bound to relieve his client from all claims of damages arising out of his own blunders or irregularities. (k) Diligence (l) not being regarded as properly a judicial proceeding, the pursuer of an action of damages for its wrongful use is not bound to aver malice and want of probable cause; and the issue allowed him is, therefore, merely whether the defenders, or any of them, wrongfully executed or caused to be executed the diligence in question; but when the action is directed against the agent as well as the client, separate issues, though in similar terms, may be allowed to each defender. (m) In order to ground an action of damages for the illegal use of personal diligence, it is not necessary that the pursuer should have been actually imprisoned; it is sufficient that he has been wrongfully apprehended; (n) and it has even been ruled that the applying for and obtaining an illegal warrant forms a relevant ground of damage, although the warrant may not have been executed. (o) The triennial prescription of actions for wrongous imprisonment, established by the Act 1701, c. 6, does not apply to those founded on imprisonment for civil debt. (p)

How use of
diligence
may be
wrongous.

15. The use of diligence may be wrongous, and sufficient to infer liability against a law agent, either on account of some irregularity, or because circumstances which he knows, or is bound to know, render it unjustifiable.

701; *Brodie v. Smith*, 18 June 1836, 14 S. 983; *Beattie v. M'Lellan*, 29 June 1846, 8 D. 930. See also Addison on Torts, 4th edition, p. 626.

(i) See cases *infra*.

(k) *Wood v. Fullarton*, 28 Nov. 1710, M. 13,960; *Macdonald v. Kelly*, 5 July 1821, 1 S. 105 (N. E. 102). See also *Smith v. Grant*, 5 June 1858, 20 D. 1077; *Frame & Co. v. Campbell and Hart & Hodge*, 9 June 1836, 14 S. 914, affirmed 3 June 1839, M'L. & Rob. 401.

(l) A charge on a bill is a diligence, and not a judicial act; *Gibb v. Edinburgh Brewery Co.*, 19 June 1873, 10 Scot. Law Rep. 504.

(m) *Inglis v. M'Intyre*, 3 July 1861, 23 D. 1240. See also *Menzies v. Stevenson & Co.*, 27 Dec. 1839, Macfarlane's Reports of Jury Trials, 281; and *Snare v. Lord Fife's Trs.*, 10 Dec. 1850, 13 D. 286.

(n) *Manuel v. Fraser*, 19 March 1818, 1 Mur. 386; *Hunter v. Kerr*, 28 March 1842, 4 D. 1175.

(o) *Bisset v. Whitson*, 27 July 1842, 5 D. 5.

(p) *M'Christie v. Kea*, 21 Jan. 1831, 9 S. 312.

16. Neither an agent nor his client incurs any liability in executing diligence on the regular decree of a competent court, (g) unless the decree is *ultra petita*, e.g., for a larger sum than has been concluded for in the summons. (r) But this immunity does not extend to the applying for or enforcing an illegal or irregular warrant; (s) and even a purely technical objection to the validity of the diligence, as for example that the debtor's name is written on an erasure, is a relevant ground of damages against the agent enforcing it. (t) But in such a case only nominal damages, or even none at all, will be awarded, where no injury has been actually sustained. (u) Substantial damages will, however, be generally given where an agent commits a serious irregularity, such as executing diligence against the wrong person, (x) arresting the person of a protected bankrupt; (y) or apprehending a debtor a second time, notwithstanding his having consigned the amount of the debt when he was first arrested. (z)

Irregularities in use of diligence.

(g) *Graham v. Dundas*, 9 July 1829, 7 S. 876; *Aitken v. Finlay*, 25 Feb. 1837, 15 S. 683; *Bell v. Gunn*, 21 June 1859, 21 D. 1008; *Ormiston v. Redpath, Brown & Co.*, 24 Feb. 1866, 4 Macph. 488. As to the decree of an incompetent court, see *Gordon's Exrs. v. Dunlop*, 13 July 1825, 3 Mur. 515.

(r) *Wilson v. Alexander*, 24 Jan. 1844, 6 D. 511, and 23 July 1846, 9 D. 7. See also *Garrioch v. Wilson*, 17 July 1851, 13 D. 1377; and *M'Cubbin v. Fulton*, 23 June 1852, 14 D. 908.

(s) *Pollock v. Begg*, 12 Nov. 1829, 8 S. 1; *Pollock v. Clark*, 12 Nov. 1829, 8 S. 7; *M'Gill v. Ferrier*, 17 March 1837, 15 S. 882; *Bisset v. Whitsan*, 27 July 1842, 5 D. 5. See also *Bell v. Black & Morrison*, 28 June 1865, 3 Macph. 1026.

(t) *Cowan v. Watt*, 11 July 1833, 11 S. 999. As to irregularities not sufficient to infer liability, see *Brodie v. Smith*, 18 June 1836, 14 S. 983; and *Henderson v. Rollo*, 18 Nov. 1871, 10 Macph. 104.

(u) *Rankine v. M'Laren*, 26 Feb. 1825, 3 Mur. 494; *Gordon's Exrs. v. Dunlop*, 13 July 1825, 3 Mur. 513; *Johnstone v. M'Craw*, 27 Dec. 1833, 12 S. 560; *Inch v. Thomson*, 14 July 1836, 14 S. 1129. As to the expenses of process when only nominal damages are awarded for wrongous imprisonment, see *Ross v. M'Vean*, 2 June 1860, 22 D. 1144, and section 40 of the Court of Session Act, 1868, 31 and 32 Vict. c. 100.

(x) *Hamilton v. Anderson*, 19 July 1830, 5 Mur. 312.

(y) *Dunlop v. Buchanan*, 7 Nov. 1828, 5 Mur. 16.

(z) *Stewart v. Macdonald*, 6 July 1784, M. 13,989.

been held, in a question between agent and client, that an agent who puts a good warrant into the hands of an officer is not liable for the latter's culpable negligence in allowing the party against whom it is directed to escape after being apprehended.(s)

Privilege of law agent in actions of damages for calumnious statements.

19. It would be utterly impossible for either advocates or law agents to discharge the duties which they owe to their clients were they to incur the same responsibility as non-professional men for injurious or calumnious statements made by them in the course of their employment. They are therefore privileged, in regard to such statements, by the laws of both England and Scotland, there being apparently no discrepancy in point of principle between the laws of the two countries.(t) There are, however, various classes of privileged statements which require to be separately considered.

Comments made in pleading at the bar.

20. An advocate or a law agent(u) pleading at the bar, is privileged to comment with freedom on all that transpires in the course of a cause, and on the conduct of individuals; and an action of damages for slander will not lie against him, however strong and severe his observations may be, provided they were made *in bona fide*, and were pertinent to the matter in issue.(v)

False statements made on client's instructions.

21. Neither advocates nor law agents incur any responsibility by uttering in Court, inserting into written or printed

v. Harding, 28 June 1845, 7 Adolphus & Ellis, Queen's Bench, 928; *Childers v. Wooller*, 11 Nov. 1859, 2 Ellis & Ellis, 287; Addison on Torts, 4th edition, p. 671.

(s) *Russell v. Hedderwick*, 15 July 1859, 21 D. 1325.

(t) Borthwick on Libel, p. 7.

(u) It has been held in England, that an attorney acting as an advocate has the same privilege as counsel; *Mackay v. Ford*, 2 June 1860, 5 Hurlstone & Norman, 792.

(v) *Moodie v. Henderson*, 9 Dec. 1800, M. 360; *Aitken v. Dudgeon*, 16 Dec. 1822, 3 Mur. 230; *Drew v. Mackenzie*, 28 Feb. 1862, 24 D. 662; *Hodgson v. Scarlett*, 23 Jan. 1818, 1 Barnewall & Alderson, 232; *Flint v. Pike*, 1825, 4 Barnewall and Cresswell, 473; *Needham v. Dowling*, 6 Nov. 1845, 15 Law Journal, Common Pleas, 9; *Regina v. Kiernan*, 11 June 1855, 7 Cox's Criminal Cases, 6; Borthwick on Libel, p. 213; Blackstone's Commentaries, iii. 29.

pleadings, or placing on record, with the authority and on the instructions of their clients, statements pertinent to the matter in issue.(x)

22. Even when law agents make defamatory statements in judicial procedure, without being expressly instructed to do so, they are entitled to the same privilege as is accorded to litigants in laying their cases before courts of law ;(y) that is to say, malice is not presumed, but must be averred and proved in actions of damages against them on the ground of slander.(z) In such an action, therefore, the issue allowed to the pursuer is, whether the defender "falsely, maliciously, and calumniously," made the statement in question ;(a) but

Statements
made in
causa.

(x) *Johnstone v. Scott*, 4 Jan. 1829, 7 S. 234 ; *Ramsay v. Nairne*, 21 Aug. 1833, 11 S. 1033. In the latter case Lord President Hope observed: "An agent is not responsible for the truth of the statements made to him by his client; and great latitude must be allowed to an agent in conducting the cause of a client. He is not entitled to invent any facts for his client; but if the client positively instructs him to make a statement, the agent does not become personally responsible for being the medium through which the client's statement is made. If such responsibility were to be incurred, it would instantly have the effect of driving all respectable men out of the profession. No man in his senses would continue to hold an office in which he incurred responsibility for making statements, avowedly not his own, but his client's, at the same time that he would incur a severe responsibility to his client if he refused to make any relevant statement which was transmitted to him. The public interest, when rightly understood, clearly requires that this privilege should be accorded to agents;" 11 S. 1045. See also *Borthwick on Libel*, p. 213 ; and *Blackstone's Commentaries*, iii. 29.

(y) *Borthwick on Libel*, p. 213 ; *Starkie on Slander and Libel*, 3d ed., p. 208 ; *Guthrie Smith on Reparation*, p. 218 ; *Logan v. Weir*, 26 Oct. 1872, 10 Scot. Law Rep., 22 ; *M'Caig v. Moscrip*, 11 Dec. 1872, 10 Scot. Law Rep., 140.

(z) *Davidson v. Megget*, 12 May 1821, 1 S. 7 (N. E. 3) ; *Yeats v. Ramsay*, 6 Dec. 1825, 4 S. 275 (N. E. 279) ; *Mackay v. Ford*, 2 June 1860, 5 *Hurlstone & Norman*, 792.

(a) *Manson v. Macara*, 7 Dec. 1839, 2 D. 208. "In an action of damages for slander, where there may or may not be privilege, the question whether malice shall or shall not be put in issue depends on the pursuer's averments. If he has himself brought out the privilege, he must meet it by putting malice in issue. If privilege does not come out on the pursuer's record, but is alleged by the defender, an issue is allowed without malice. But whenever the privilege appears on the proof, malice

it has been held not necessary to add the words "without probable cause, and without the defender believing them to be true."(b)

Slander
uttered by
an advocate
on an
agent's in-
structions.

23. In a recent action of damages by one law agent against another, for alleged slander uttered in court by an advocate on the instructions of the defender, it was held that the pursuer must put in issue whether the statement was false and calumnious, and was made "in conformity with the instructions of the defender maliciously given."(c) Upon this issue the jury found for the pursuer; but a majority of the judges of both Divisions of the Court, granted an application for a new trial, on the ground that the verdict was contrary to evidence, holding that, in order to support the verdict, there must be proof that the alleged false and calumnious statement proceeded in all its substantial parts, if not in the precise words, upon the instructions of the defender; and that, although malice may be inferred from facts and circumstances, without direct evidence of personal ill-will, and although it will not protect a law agent making a false and calumnious statement, that he had probable cause for believing part of it to be true, or that his motive for making it was to benefit his client and not to injure the person of whom it was made, yet proof that the statement was in part false or erroneous is not sufficient evidence of malice.(d)

becomes essential to the pursuer's case. If he has not alleged malice on record, his case is gone. But if he has alleged malice on record, then, though the issue, framed on the footing of the absence of privilege, did not contain malice, he is entitled to prove malice to meet the privilege."—*Per* Lord Ardmillan in *M'Bride v. Williams & Dalzell*, 28 Jan. 1869, 7 Macph. 427. See also *Torrance v. Leaf & Co.*, 21 Nov. 1834, 13 S. 72.

(b) *Marianski v. Henderson*, 17 June 1841, 3 D. 1036. See also *M'Intosh v. Flowerdew*, 19 Feb. 1851, 13 D. 726; and *Bayne v. Macgregor*, *infra*.

(c) *Bayne v. Macgregor*, 18 June 1862, 24 D. 1126. See also as to slanderous statements made through the medium of an advocate, *Forteith v. Earl of Fife*, 18 Nov. 1819, 20 F.C. 8; and 20 March 1821, 2 Mur. 463; *Swinton v. Taylor*, 8 June 1821, 1 S. 59 (N. E. 60), affirmed 4 June 1824, 2 S. App. 245.

(d) *Bayne v. Macgregor*, 14 March 1863, 1 Macph. 615. Lord President

24. Proof of malice in an agent is not proof of malice in his client, unless it is shown that in acting maliciously the agent was carrying out the wishes of his client.^(e) Liability of client for his agent's slander.
 In one case, a party who had been found liable in expenses on account of accusations contained in pleadings, having brought an action of relief against his agent, on the ground that they had been inserted without authority, proof of

M'Neill observed :—"What amounts to malice in law may often be a very difficult question. The evidence to establish malice need not be direct evidence, of personal ill-will. It may be enough to prove facts and circumstances from which malice may be reasonably inferred. These may be connected with the utterance of the slander, or they may be circumstances antecedent to the slander. In this case there are no antecedent facts and circumstances from which malice may be inferred. The evidence is hostile to such a conclusion. The malice alleged here is of that kind which the law allows to be inferred from facts and circumstances connected with the occasion when the slander was uttered. In some cases malice may be easily and reasonably deduced from the words themselves, or the attending circumstances. The falsehood of what is said is always an important element, and sometimes it is conclusive. For example, if, from pure invention, one agent strings together a series of false statements about the opposite agent, as to characterise him as guilty of acts for which he might legally be imprisoned, or transported, or hanged, the mere falsehood of such allegations, which is always presumed, and the absence of reasonable or probable cause for them, would warrant the inference of malice, and it would be no defence to prove that the motive of the defender in inventing and uttering these slanderous statements was not to injure the pursuer, but to benefit his own client. On the other hand, if the defender, having a duty to perform to his client, should make, or instruct his counsel to make, statements pertinent to the cause, and if he makes these statements, or gives these instructions to his counsel in *bona fide*, and after having received information on which he is entitled to rely, the mere falsehood of the statement is not enough to make him responsible; and it is clearly not enough to make him responsible that the statement is false or erroneous in some matter of detail, as in the *locus*, or as in the manner in which he stated that the things of which he accused the other party were done; as, for example, if he said that the other party stole a blunderbuss, when, in truth, he stole a pistol, or that he fraudulently obtained possession of a bill, when it was a promissory-note; the substance of the act done being the same as that alleged to have been done."

(e) *Mackellar v. D. of Sutherland*, 18 June 1862, 24 D. 1124; *Watson v. Smeaton*, Feb. 1805, Hume, 624.

direct authority was held not to be necessary, as the circumstances raised an inference of acquiescence or approval.(g)

Liability of
counsel for
malicious
slander.

25. Even counsel do not appear to be absolutely exempt from liability for slander uttered by them in judicial procedure, or inserted into written or printed pleadings; but a case of special malice must be made out against them.(h)

Only per-
tinent state-
ments are
privileged.

26. It is only relevant and pertinent statements that are privileged.(i) But the time at which the pertinency of a statement falls to be ascertained is the time at which it was made;(k) and there can be no doubt that an agent will not be held liable in damages for statements authorised by his clients, unless he must have known them to be wholly impertinent.(l) Both advocates and law agents, however, are answerable to the Court for any irrelevancy or impertinency contained in papers drawn or lodged by them.(m) The Court of Session have frequently checked improper oral pleadings, and ordered improper passages to be expunged from printed or written pleadings.(n) A charge of fraud against the agent of the opposite party in a lawsuit,

(g) *Stewart v. Falconer*, 3 July 1830, 5 Mur. 299; and 2 Feb. 1831, 9 S. 381. See also *M'Craig v. Moscrip*, 11 Dec. 1872, 10 Scot. Law Rep. 140.

(h) *Taylor v. Swinton*, 4 June 1824, 2 S. App. 249; *Hodgson v. Scarlett*, 23 Jan. 1818, 1 Barnewall & Alderson, 232; *Flint v. Pike*, 1825, 4 Barnewall & Cresswell, 473; *Regina v. Kiernan*, 11 June 1855, 7 Cox's Criminal Cases, 6; Blackstone's Commentaries, iii. 29; and Borthwick on Libel, p. 313.

(i) *Ewing v. Cullen*, 24 Aug. 1833, 6 W. & S. 566; *M'Intosh v. Flowerdew*, 28 Nov. 1851, 14 D. 116; *Mackellar v. D. of Sutherland*, 14 Jan. 1859, 21 D. 222, and 18 June 1862, 24 D. 1124; Borthwick on Libel, p. 217.

(k) *M'Craig v. Moscrip*, 11 Dec. 1872, 10 Scot. Law Rep. 140.

(l) *Gray v. Walker*, 12 July 1837, 15 S. 1296; Opinion of Lord Gillies in *Gilchrist v. Dempster*, 10 Sept. 1823, p. 439 of Borthwick on Libel; *Ersk. iv.* 4. 80; *Johnstone v. Scott*, 4 Jan. 1829, 7 S. 234; *Ramsay v. Nairne*, 21 Aug. 1833, 11 S. 1033; *Flint v. Pike*, 1825, 4 Barnewall & Cresswell, 473.

(m) *Hamilton v. Anderson*, 11 June 1856, 18 D. 1003, affirmed 18 June 1858, 3 Macq. 363.

(n) Borthwick on Libel, p. 216; *Herdman v. Young*, 11 Dec. 1744, M. 13,987.

if pertinent to the case, is not to be struck out before proof; but it has been observed by Lord Chancellor Eldon, that if it is ultimately found impertinent and scandalous, it is worthy of consideration whether the counsel who inserted it ought not to bear the costs rather than the party.(o)

27. The privilege accorded to law agents is not confined to proceedings *in causa* or incident thereto, but extends to extrajudicial statements necessarily or properly made by them in the discharge of their professional duties. In particular, great latitude is allowed to an agent in conversing and corresponding with the agent of a party against whom he is employed; and no action will lie against him, if he does not act with malice, but merely with zeal for his client.(p) In one case, where an agent opposing the discharge of a bankrupt in a *cessio* asserted, in a private conversation with another agent engaged in the same process, that the bankrupt was a "fraudulent bankrupt," the Court held that he was entitled to give his reasons for opposing the discharge, and that to abridge this liberty, either while used in pleadings before the Court or in private conversations between men of business, would be highly unwise, and would too much fetter proceedings in matters of business.(q) And more recently, a bankrupt having raised an action of damages against certain of his creditors and their agent, on account of the statements of fraudulent conduct on his part, which were contained in a letter by these creditors, and under their directions circulated by the agent among the other creditors, in order to induce them to refuse a proposed composition and insist on a sequestration; he was held bound to put in issue whether the statements were made and circulated "maliciously," as well as "falsely and calum-

Extrajudicial statements, how far privileged.

(o) *Roberts v. Graham*, 5 July 1815, 3 Dow, 273. See also *Ex parte Williams*, and *Ex parte Wake*, March 1833, 3 Deacon & Chitty, 103 and 246, in which attorneys were found personally liable in costs for irrelevant and scandalous statements.

(p) *Ramsay v. Nairne*, 21 Aug. 1833, 11 S. 1033; *Manson v. Macara*, 7 Dec. 1839, 15 F. 200, 2 D. 208.

(q) *Stein v. Marshall*, 24 Jan. 1804, M. 12,443. See also *Crichton v. Forrest*, 28 Jan. 1808, p. 399 of Borthwick on Libel.

niously.”(r) An agent, however, is not privileged to obtrude on third parties unconnected with the proceedings in which he is employed,(s) and still less to publish to the world, injurious or calumnious statements regarding those against whom he is acting.(t)

Confidential
communications privi-
leged.

28. Law agents appear to be completely protected from all liability on account of confidential communications made by them to their clients. Thus, it was held in one case that statements contained in confidential letters by an agent to his employer, in regard to the conduct of the latter's factor, were not actionable, although it was alleged that they had been made maliciously and falsely, and had been communicated by the client to third parties.(u) It has, however, been observed by Mr Borthwick, in his treatise on the Law of Libel, that this decision was not unanimous, and that there is no other reported case in which this point of privilege has been carried so far.(x)

(r) *Torrance v. Leaf & Co.*, 21 Nov. 1834, 13 S. 72 and 1146.

(s) *Ramsay v. Nairne*, 21 Aug. 1833, 11 S. 1033.

(t) *Kennedy v. Baillie*, 5 Dec. 1855, 18 D. 138; *Swinton v. Taylor*, 8 June 1821, 1 S. 59 (N. E. 60), affirmed 4 June 1824, 2 S. App. 245; *Flint v. Pike*, 1825, 4 Barnewall & Cresswell, 473. See also *Walker v. Cumming*, 1 Feb. 1868, 6 Macph. 318; and *Daw v. Eley*, 15 Dec. 1868, 7 Law Reports, Equity, 49.

(u) *Stewart v. Swinton*, 26 May 1825, 21 F.C. 789. See also *Cullen v. Ewing*, 14 March 1832, 10 S. 497, where the pursuer, who alleged that false and calumnious statements in regard to him had been made by the defender to his agents in a previous process with another party, was held not entitled to prove these statements by the agents; reversed on other grounds, 24 Aug. 1833, 6 W. & S. 566.

(x) Borthwick on Libel, p. 238.

CHAPTER XXII.

PROFESSIONAL LIABILITIES.

1. By the mere acceptance of employment, a law agent undertakes to perform, with due diligence and the requisite skill, the business committed to his charge; (a) and he is liable to his employers for any loss or damage that they may sustain through the breach of his implied undertaking. The professional liabilities thus arising may be classified under three heads, any one of which is a relevant ground for an action of damages—(1) liability for a positive breach of duty; (2) liability for gross negligence; and (3) liability for gross ignorance or want of professional skill. (b) It is, however, often very difficult to distinguish the last two from each other; and it is therefore quite customary for the pursuer of an action of damages to state that, in the circumstances which he sets forth, the defender has been guilty of either gross negligence or gross ignorance and unskilfulness.

General
nature of
professional
liabilities.

2. If a law agent is otherwise liable in damages to a client, the fact that he has acted gratuitously, (c) or as agent

Liability
not affected
by agent's
acting gra-
tuitously.

(a) See opinion of Lord Justice-Clerk Inglis in *Bell v. Ogilvie*, 18 Dec. 1863, 2 Macph. 336.

(b) See opinion of Lord Campbell in *Landell v. Purves*, 10 March 1845, 4 Bell, 46, and 12 Clark & Finnelly, 91; and opinion of Lord Brougham in *Haldane v. Donaldson*, 3 Aug. 1840, 1 Rob. 226.

(c) *Mark v. Somerville*, 27 May 1800, Hume, 326; *Bourne v. Diggles*, 9 Nov. 1814, 2 Chitty, 311; *Lillie v. Macdonald*, 13 Dec. 1816, 19 F.C. 234, affirmed 25 May 1819, 1 Bligh, 315; *Currie v. Colquhoun*, 17 June 1823, 2 S. 407 (N. E. 361); *Haldane v. Donaldson*, 3 March

for the poor,(d) is insufficient to relieve him of his professional liability.

Various
modes in
which lia-
bility may
be pleaded

3. There are three modes in which the professional liability of law agents may be pleaded and enforced against them— (1) as a defence to an action for payment of the amount of an account, or as the ground of a claim for repetition of an account which has been paid; (2) as the ground of an action of damages; and (3) as the ground of a claim of relief of damages to which a client has been subjected through the fault of his agent. The first of these has been already fully considered; and it is sufficient to state here that when professional liability is so pleaded it does not seem necessary to establish the same degree of *culpa* on the part of the agent as is required in the other cases.(e) There is no substantial difference between a direct action of damages and a claim for relief of damages;(g) and where an agent has committed a manifest blunder, his employer may bring an action of relief, without waiting the issue of a process in which the effect of the blunder is to be determined.(h)

Degree of
diligence
and skill
required
from law
agents.

4. As regards the degree of diligence and skill which a law agent is bound to exhibit in the affairs of his employers, the legal maxim applicable to all professional men holds good—*spondet peritiam artis*. "Professional men possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be liable for errors in judgment, whether in matters of law or of dis-

1836, 14 S. 610, affirmed 3 Aug 1840, 1 Rob. 226; *Hanlon v. Murray*, 25 May 1860, 12 Irish Common Law Reports, 161. See also *M'Donald v. M'Donald*, 18 Nov. 1807, Hume, 344; and *Ker v. Grahame*, 4 March 1757, M. 3549, affirmed 9 March 1758, 2 Pat. App. 13.

(d) *Hay v. Baillis*, 30 Oct. 1868, 7 Macph. 32.

(e) *Ante*, p. 132 *et seq.*

(g) *Wood v. Fullarton*, 28 Nov. 1710, M. 13,960; *Macdonald v. Kelly*, 5 July 1821, 1 S. 105 (N. E. 102); *Frame & Co. v. Campbell and Hart & Hodge*, 9 June 1836, 14 S. 914, affirmed 18 June 1839, M'L. & Rob. 595; *Landell v. Purves*, 27 May 1842, 4 D. 1300, 1543, reversed 10 March 1845, 4 Bell, 46.

(h) *Currie v. Colquhoun*, 17 June 1823, 2 S. 407 (N. E. 361).

cretion. Every case, therefore, must depend upon its own peculiar circumstances; and when an injury has been sustained which could not have arisen except from the want of such reasonable information and skill, or the absence of such reasonable skill and diligence, the law holds the attorney liable. In undertaking the client's business, he undertakes for the existence and employment of these qualities and receives the price of them. Such is the principle of the law of England,⁽ⁱ⁾ and that of Scotland does not vary from it."^(k)

5. The question has been raised, but not decided, whether a professional man, discharging the ordinary duties of a factor of trustees, must be understood to act upon his professional responsibility. Where a writer in Glasgow, taking the orders of trustees as to the payments to be made, paid a share of the trust-funds to the next of kin of a deceased legatee, without requiring a confirmation, instead of to a party to whom the legatee had bequeathed his legacy, he was held liable to relieve the trustees of all claim in regard to payments made after he became aware of the legatee's testament, but not those which he had previously made.^(l)

6. A client claiming reparation from his law agent on the ground of professional liability, must aver the breach of a specific duty, set forth in the summons, or allege gross

Is a factor
of trustees
of a profes-
sionally
liable?

Averments
necessary to
ground an
action of
damages.

(i) *Pitt v. Yalden*, 19 May 1767, 4 Burrow, 2060; *Baillie v. Chandless*, 8 June 1811, 3 Campbell, 17; *Lanphier v. Phipps*, 16 Feb. 1838, 8 Carlington & Payne, 479; *Lewis v. Collard*, 25 Nov. 1853, 23 Law Journal, Common Pleas, 32; *Parker v. Rolls*, 10 May 1854, 14 Scott, Common Bench, 691; *Chapman v. Chapman*, 20 Jan. 1870, 9 Law Reports, Equity, 276. The recent English statute, allowing attorneys to enter into agreements with their clients as to the amount of their remuneration, expressly declares that "a provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void;" 33 and 34 Vict. c. 28, § 7.

(k) *Per* Lord Chancellor Cottenham in *Frame & Co. v. Campbell, &c.*, 18 June 1839, M.L. & Rob. 595. See also the opinion of Lord Brougham in *Landell v. Purves*, 10 March 1845, 4 Bell, 46; and 12 Clark & Finnelly, 91.

(l) *Mirrlees v. Mathie*, 17 May 1826, 4 S. 591 (N. E. 599), 1 F. 554.

negligence or want of professional skill, or at least state circumstances necessarily raising an inference of one or other of these.(m) The necessity for such a specific statement is well illustrated by the case of *Landell v. Purves*,(n) the summons in which set forth, that the pursuer had employed the defender to recover payment of a debt from a person residing at Berwick-on-Tweed; that the defender had advised him to proceed by a border warrant; that this course having been followed, the warrant was found to be illegal, in consequence of which the pursuer had been subjected in damages to the debtor, from which he now claimed to be relieved by the defender. The House of Lords, reversing the judgment of the Court of Session, held that the summons was irrelevant, as the circumstances set forth were not sufficient inevitably to infer gross negligence or gross ignorance, neither of which was expressly libelled.

Application
of general
principles to
particular
circum-
stances.

7. Although the general principles in regard to professional liability are free from doubt, yet the terms in which they are expressed are necessarily only relative; and hence difficulty frequently arises in applying them to the circumstances of particular cases. Hence also, comparatively little assistance can be got from the decisions of the English courts, although, as has been already stated, there is no difference in point of principle between the laws of the two countries.(o) The doctrine of professional liability can

(m) *Landell v. Purves*, *infra*; *Cooke v. Falconer's Reps.*, 26 Nov. 1850, 13 D. 157; *Hume v. Baillie*, 28 May 1852, 14 D. 821; *Hamilton v. Emslie*, 27 Nov. 1868, 7 Macph. 173.

(n) *Landell v. Purves*, 27 May 1842, 4 D. 1300 and 1543; reversed 10 March 1845, 4 Bell, 46, and 12 Clark & Finnelly, 91.

(o) "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of Court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of

therefore be best explained and defined by a review of the Scotch cases on the subject, with occasional references to English decisions.

8. Among the positive breaches of duty for which a law agent may be found liable in damages may be mentioned the betrayal of his client's confidence or the divulging of his secrets, *(p)* acting without authority, *(q)* or contrary to or in excess of his instructions, *(r)* and the secret purchase of property which he has been employed to sell. *(s)*

Positive breach of duty.

9. A law agent is liable in reparation to his clients for any loss which they may sustain through his culpable neglect of duties which he has undertaken to perform, or which are necessarily or naturally implied in his employment. *(t)* But an action of damages on this ground will not be sustained if the pursuer merely states in general terms that the defender failed to take the proper steps to carry out his instructions: he must distinctly specify what instruc-

Negligence generally.

the conduct of a cause, as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law."—*Per Tindal, C. J., in Godfrey v. Dalton*, 12 Feb. 1830, 6 Bingham, 467.

(p) *Bogle v. Cameron*, 16 Feb. 1844, 6 D. 682; *Moore v. Terrell*, 8 May 1833, 4 Barnwell & Adolphus, 870; *Taylor v. Blacklow*, 8 Nov. 1836, 3 Bingham's New Cases, 235. See also *Buchanan v. Pearson*, 19 June 1840, 2 D. 1177; and *A. v. B.*, 13 Dec. 1851, 14 D. 177.

(q) *Thomson v. Candlemakers of Edinburgh*, 25 May 1855, 17 D. 774; *Weepers v. Pearson*, 21 Jan. 1859, 21 D. 305; *Bailey v. Buckland*, 1847, 5 Dowling & Lowndes, 115; *Westaway v. Frost*, 12 July 1848, 17 Law Journal, Queen's Bench, 286.

(r) *Stewart v. Falconer*, 3 July 1830, 5 Mur. 299, and 2 Feb. 1831, 9 S. 381; *Forbes & Co. v. Campbell*, 17 July 1845, 7 D. 1068; *Thom v. Bridges*, 11 March 1857, 19 D. 721; *Fray v. Voules*, 3 May 1859, 1 Ellis & Ellis, 839. See also *Forbes & Co. v. Campbell*, 17 July 1845, 7 D. 1068; and *ante* p. 93 *et seq.* As to deviating from client's instructions on the advice of counsel, see *post*, p. 324.

(s) *Gourlay's Trs. v. Kerr*, 6 Dec. 1856, 19 D. 135; and 6 June 1857, 19 D. 789.

(t) See cases *infra*; and Pothier, *Traité du Contrat de Mandat*, § 131. An agent employed in a sequestration is not responsible for neglect in the performance of duties proper to the trustee; *Gourlay v. Stratton*, 15 June 1827, 5 S. 804 (N. E. 743).

by the English courts that no liability attaches where the meaning of an Act is obscure or doubtful. (g) In such cases regard must be had to the whole circumstances of the agent's conduct; and he will not be held responsible for the consequences of a mistake in a point of law upon which a reasonable doubt may be entertained.

Liability of
country
agent for
litigation in
the supreme
courts.

15. A country agent is not bound to watch the progress of a cause in the supreme courts, the management of which has been intrusted to an Edinburgh agent; and in one case a country agent was held to have incurred no liability by stating to his client that all was right with reference to an action in the Court of Session, while in point of fact he did not know in what position the action stood, and had made no inquiry regarding it for six months. (h) But, on the other hand, a country agent is bound to answer the letters of the Edinburgh agent whom he employs. Thus, where a country agent who had been employed to raise inhibition on the dependence of an action returned no answer to a letter from his Edinburgh agent, inquiring if the summons had been called, in consequence of which neglect the summons was not called within a year, and the inhibition thus fell, the Court held that, although the country agent had been superseded by another agent before the expiration of the year, he was nevertheless liable for the loss arising from his neither having returned an answer to the Edinburgh agent, nor communicated the state of matters to the new country agent. (i)

Negligence
in the use
of diligence.

16. A law agent employed to recover a debt, or to use arrestments, &c., is liable in damages, if he neglects to take the necessary steps. (k) In one case, however, where an agent

(g) *Baillie v. Chandless*, 8 June 1811, 3 Campbell, 16; *Kemp v. Burt*, 16 Jan. 1833, 4 Barnewall & Adolphus, 424; *Elkington v. Holland*, 18 April, 1842, 9 Meeson & Welsby, 659; *Chapman v. Van Toll*, 9 Nov. 1857, 8 Ellis & Blackburn, 396; *Crosby v. Murphy*, 31 May 1858, 8 Irish Common Law Reports, 301.

(h) *Barles v. Strathern and Douglas*, 17 Feb. 1860, 22 D. 851. See also *post*, p. 339.

(i) *Short v. Lascelles*, 16 May 1828, 6 S. 810.

(k) *Garden & Donaldson v. Pilmore*, 30 Jan. 1724, M. 3519; *Cunningham & Simpson v. Buchanan*, 6 July 1809, Hume, 349; *Highgate v. Boyle*,

had failed to arrest property belonging to the debtor, in circumstances which rendered the competency of arrestments extremely doubtful, he was held not liable for the amount of the debt. (l) In several cases where law agents have received bills of exchange for the purpose of negotiating them, or of raising and executing diligence against the debtors, they have been subjected in damages for neglecting to do so; (m) and where an agent who was intrusted with a bill, "for the purpose of doing such diligence as to put the drawer on an equal footing with the other creditors" of the acceptor, neglected to adjudge along with the other creditors, and did not give his client an opportunity of considering as to the expediency of leading an adjudication, he was found liable in payment of a sum equal to that which his client would have received if an adjudication had been led. (n) When, however, a bill was put into an agent's hands in order that he might attach any property in this country belonging to the debtor, he was held excused for not having executed diligence, in respect that the pursuer did not condescend on any funds out of which payment could have been recovered, and that the action was brought after a delay of nearly twenty years. (o) So strict is the attention required to instructions regarding the execution of diligence, that in one case agents instructed to execute a caption against a debtor were held

12 Feb. 1823, 2 S. 204 (N. E. 181); *M'Farlane's Exrs. v. Ferguson*, 26 June 1834, 12 S. 824, and 17 Feb. 1835, 13 S. 477; *Hay v. Baillie*, 30 Oct. 1868, 7 Macph. 32. See also *Harrington v. Binns* (1863, 3 Foster & Finlason, 942), where it was held that, in order to maintain an action against an attorney who has recovered a verdict for his client for negligence in not issuing execution, there must be some evidence that it was desirable or for the benefit of the client to do so.

(l) *Hume v. Baillie*, 28 May 1852, 14 D. 821. See also *Hay v. Baillie*, *supra* (k).

(m) *Murray v. Durne*, 6 Dec. 1797, *Hume*, 323; *Highgate v. Boyle*, 18 Nov. 1819, *Hume*, 356; *Pentland v. Wight*, 28 June 1833, 11 S. 804. The transmission by a client to his agent of a current bill, without special instructions, is an implied mandate to do diligence; *McDonald v. Kelly*, 5 July 1821, 1 S. 105 (N. E. 102).

(n) *Mason v. Thom*, 4 Feb. 1787, *M.* 3535, and 13,969.

(o) *Gillon v. Drummond*, 30 July 1724, *M.* 3532.

liable for the debt, in respect that they had allowed the debtor to go to England to find a cautioner, although he returned in a few days.^(p) But, more recently, an agent who had neglected to obtain and execute a *meditatio fugæ* warrant against a debtor, whose bill was not payable for several months, was held not liable for the amount of the debt, on the ground that, before the bill fell due, his client received notice of the debtor's residence, and had ample opportunity to attach his person, either by a *meditatio fugæ* warrant before the bill became due, or by ordinary diligence thereafter.^(q)

Negligence
in allowing
debtor to be
discharged.

17. Where a law agent is instructed to take the necessary steps to prevent the discharge of an imprisoned debtor, but neglects to do so, and the debtor is consequently set at liberty, the agent is liable for the amount of the debt.^(r)

Negligence
in convey-
ancing.

18. A law agent employed to draw or prepare a deed is generally expected also to get it properly executed, and is liable in damages to his employer for neglecting or failing to do so,^(s) unless his employer has himself undertaken this duty, or interfered in such a way as to take the matter out of the agent's hands.^(t) Similarly, the duty of

(p) Slater v. Henderson and Scott, 17 Jan. 1822, 1 S. 241 (N. E. 229).

(q) Watt v. Adamson, 10 Dec. 1828, 7 S. 177.

(r) Dougan v. Smith, 3 July 1817, Hume, 356, and 19 F.C. 369. In this case the agent was held liable for failing to aliment the debtor, his client having remitted to him money for that purpose, in consequence of which neglect the debtor was liberated under the Act of Grace. See also Brown v. Mackie, 23 Jan. 1852, 13 D. 358, where an agent was held liable to a creditor in a sequestration for a blunder in consequence of which the bankrupt got his discharge. Reference may also be made to the following English cases, in which attorneys have been held liable for neglecting to timeously charge prisoners-defendants in execution, in consequence of which the latter were set at liberty:—*Russell v. Palmer*, 1767, 2 Wilson, 325; *Russell v. Stewart*, 21 Nov. 1765, 3 Burrow, 1787; *Pitt v. Yalden*, 19 May 1767, 4 Burrow, 2060; *Lee v. Ayrton*, Peake, 119.

(s) Currie v. Colquhoun, 17 June 1823, 2 S. 407 (N. E. 361), where an agent employed to prepare minutes or missives of sale of heritable property, and failing to have them duly tested, was held liable in damages on the other party resiling from the bargain.

(t) Wallace v. Fisher & Watt, 4 Nov. 1870, 9 Macph. 75. See also

taking the ordinary and usual steps to render a deed effectual, is thrown upon the agent who draws it. Thus, agents have been frequently subjected in damages for failing timeously to intimate assignments;(u) to register deeds;(v) or to obtain confirmation, where required for the effectual completion of a transaction.(x) Neglect on the part of a law agent acting for a tenant timeously to intimate to the landlord the tenant's demand for a renewal of his lease is also a relevant ground for an action of damages.(y)

19. A law agent acting for a purchaser of heritable property, or for a lender on heritable security, is strictly bound (unless his client has expressly dispensed with the precaution) to have the records searched,(z) and to communicate to his client any incumbrances that may be thus discovered; and he is liable for any loss that may be occasioned by his omission to do so, even although the transaction is among relations or co-trustees, and though he has every reason to believe that the property is not encumbered.(a)

Obligation
to search
records.

20. The agent of a seller may render himself liable in damages if, after the completion of the sale, he suffers the price to be lost through his negligence; but if the title

Obligations
of the agent
of a seller.

Webster v. Young, 20 Feb. 1851, 13 D. 752; and *M'Alister v. Gemmell*, 17 May 1862, 24 D. 956, affirmed 23 Feb. 1863, 1 Macph. (H. L.) 1.

(u) *Lillie v. Macdonald*, 13 Dec. 1816, 19 F.C. 234, affirmed 25 May 1819, 1 Bligh, 315; *Wallace v. Donald*, 13 Jan. 1825, 3 S. 433 (N. E. 304); *Stuart v. Miller*, 12 Dec. 1840, 3 D. 255; *Fleming v. Robertson*, 17 June 1859, 21 D. 982, reversed 25 June 1861, 23 D. (H. L.) 8, and 4 Macq. 167.

(v) *Paris v. Smith*, 5 March 1823, 3 Mur. 332; *Donald's Trs. v. Yeats*, 11 July 1839, 1 D. 1249; *O'Hanlon v. Murray*, 25 May 1860, 12 Irish Common Law Reports, 161.

(x) *Rowand v. Stephenson*, 6 July 1827, 5 S. 903 (N. E. 838), affirmed 14 July 1830, 4 W. & S. 177, and 2 Dow & Clark, 119.

(y) *Wight's Trs v. Jameson*, 28 May 1863, 1 Macph. 815.

(z) As to what records require to be searched, see Bell's *Lectures on Conveyancing*, p. 663 *et seq.*; and Mowbray's *Manual of Conveyancing*, 2d ed., p. 310.

(a) *Hunter v. Fleming*, 11 Dec. 1829, 8 S. 234; *Graham v. Hunter's Trs.*, 4 March 1831, 9 S. 543; *Campbell v. Clason*, 20 Dec. 1838, 1 D. 270. See also *Cooper v. Stephenson*, 10 May 1852, 21 Law Journal, Queen's Bench, 292; and as to the extent of liability, *post*, § 32.

to the property still remains in the person of his client, he is liable, not for the full price, but only for such loss as may be actually sustained in consequence of the transaction not taking effect. (b) In one case, the law agent and factor for a trust, who neglected to enforce an obligation in articles of roup that the purchaser of certain subjects, forming part of the trust-estate, should find security for the price within three weeks, was held liable for the loss arising from the purchaser's bankruptcy. (c) It has been held in England that an attorney employed by a vendor is liable in damages, if he allows him to come under an unusual obligation, without any explanation of its meaning and effect. (d)

Obligations
of the agent
of a pur-
chaser.

21. The agent of an intending purchaser is bound to investigate the title of the vendor, in order to ascertain whether the seller is able to grant a valid conveyance; (e) and also, before payment of the price, to get an unencumbered and sufficient title; otherwise he is liable in reparation for the consequences of his omission. (g) In an English case, the attorney of a purchaser was held liable for omitting to state, in a case for the opinion of counsel, certain deeds materially affecting the title, the purchaser having concluded the transaction on the faith of the opinion so obtained, and thereafter sustained loss through the title being imperfect. (h) A seller not being bound, in the absence of express stipulation, to grant a disposition with an alternative holding (which, however, is now in most cases implied under the provisions of recent Conveyancing Acts), (i) but only such a disposition as will enable the

(b) *Allan v. Mansfield*, 24 Jan. 1834, 12 S. 329, 9. F. 199; and *post*, § 31.

(c) *Davidson v. Thomson*, 25 Nov. 1849, 12 D. 179.

(d) *Stannard v. Ullithorne*, 21 April 1834, 10 Bingham, 491. See also *Montmorency v. Devereux*, 25 Feb. 1840, 7 Clark & Finnelly, 188.

(e) *Donald's Trs. v. Yeats*, 11 July 1839, 1 D. 1249; *Allen v. Clark*, 2 Feb. 1863, 7 Law Times, N. S., 781; *Knight v. Quarles*, 14 June 1820, 4 Moore, 532.

(g) *Donald's Trs. v. Yeats*, *supra*; *Brown v. Cheyne*, 10 March 1831, 9 S. 573, and 1 March 1833, 11 S. 497; *Hunter v. Fleming*, 11 Dec. 1829, 8 S. 234.

(h) *Ireson v. Pearman*, 1825, 5 Dowling & Ryland, 687.

(i) 31 and 32 Vict. c. 101, § 6.

purchaser to take his place, the purchaser's agent is not liable in damages for taking a disposition with an obligation to infest only *a me* and a procuratory of resignation.^(k)

Obligations
of agent of
lender.

22. An agent employed by the lender in an ordinary loan transaction is bound to get for his client an effectual obligation.^(l) Thus, damages were awarded against an agent for having taken a personal bond from a married woman.^(m) When heritable security is to be given by the borrower, the lender's agent is not entitled to frame the bond in such a manner as to give his client merely heritable security without any personal obligant.⁽ⁿ⁾ In one case, where an agent had introduced into a heritable security an obligation of a peculiar kind, in place of the usual obligation to infest *a me vel de me*, and did not get the deed confirmed by the borrower's superior, in consequence of which the majority of the Court held the security to be ineffectual, he was found liable in damages, notwithstanding the doubtfulness of the legal question so decided, in respect that the difficulty had arisen from his unnecessary deviation from the usual practice.^(o) When heritable security is to be given to the lender, his agent is bound not only to search the records and communicate to his client any encumbrances which he may discover,^(p) but also to ascertain as far as possible the amount

(k) *Miller v. Young*, 1 Dec. 1843, 6 D. 149.

(l) In addition to the cases *infra*, see *Carruthers v. Little*, 6 June 1829, 7 S. 712, where an English attorney employed to recover a debt or get good security, having taken an obligation in a form which could not be effectually enforced in an English court, whereby the debt was lost, and having at the same time taken one for his own account, in a form which was available, he was held liable in payment of the debt. In the English case of *Parker v. Rolls* (10 May 1854, 14 Scott, Common Bench, 691) it was held to be actionable negligence for an attorney employed to prepare a security for an annuity, which required to be under seal, to take it in the form of a mere agreement.

(m) *Smith v. Kemp*, 10 Jan. 1828, 4 Mur. 400.

(n) *Sim v. Clarke*, 2 Dec. 1831, 10 S. 85, affirmed 1 July 1833, 6 W. & S., 452.

(o) *Rowand v. Stevenson*, 6 July 1827, 5 S. 903 (N. E. 838), affirmed 14 July 1830, 4 W. & S., 177, and 2 Dow & Clark, 199.

(p) *Graham v. Hunter's Trs.*, 4 March 1831, 9 S. 543; *Campbell v. Clason*, 20 Dec. 1838, 1 D. 270.

of arrears of interest, if any, due on prior securities.(q) He is, of course, also bound to investigate the borrower's title to the property which is to be disposed or assigned in security;(r) and if it is invalid, he must communicate the fact to his employer.(s) It is not a relevant defence to an action of damages that, even if the security had been effectually completed, the lender would not have realised anything from it; seeing that, if he had been informed of its invalidity, he would not have lent out his money on the faith of it.(t)

Liability of
agent of
lender for
taking defi-
cient secu-
rity.

23. There are no Scotch cases relating to the liability incurred by a law agent who takes a security which proves to be insufficient for the sum advanced by his client. But having regard to the English decisions on the subject, it may be stated that he will not be responsible for the deficiency,(u) unless his position is one of trust as well as of agency,(x) or unless he has been specially instructed to see to the sufficiency of the security.(y) Even in such cases an agent will probably not be held liable, if his employer has taken the matter into his own hands, so as to lead the agent to believe that he has satisfied himself on the subject.(z) And it has recently been held in England that a solicitor lending his client's money on mortgage on landed property, which ultimately turns out to be inadequate, is not liable for

(q) *Campbell v. Clason*, 16 June 1840, 2 D. 1113; and 30 March 1843, 5 D. 1081.

(r) *Wilson v. Tucker*, 30 Oct. 1822, 3 Starkie, 154, where an attorney, acting for a person who advanced money on the security of a legacy given to the borrower, was held liable for relying on a partial extract from the will, without examining the will itself.

(s) *M'Leod v. M'Donald*, 22 Jan. 1835, 13 S. 287.

(t) *Stuart v. Miller*, 12 Dec. 1840, 3 D. 255.

(u) *Dartnall v. Howard*, 16 June 1825, 6 Dowling & Ryland, 468; *Hayne v. Rhodes*, 12 Jan. 1846, 15 Law Journal, Queen's Bench, 137; *Mare v. Lewis*, 8 Dec. 1869, 4 Irish Reports, Equity, 219.

(x) *Craig v. Watson*, 28 April 1845, 8 Beavan, 427. As to investments by trustees, see *M'Laren on Wills and Succession*, vol. ii. 320.

(y) *Whitehead v. Greatham*, 10 Feb. 1825, 2 Bingham, 464; *Howell v. Young*, 1826, 8 Dowling & Ryland, 14; *Smith v. Pococke*, 22 Feb. 1854, 23 Law Journal, Chancery, 545.

(z) *Waine v. Kempster*, 1859, 1 Foster & Finlason, 695; *Brumbridge v. Massey*, 16 Nov. 1858, 2 Law Journal, Exchequer, 59.

the loss sustained, where his advice has been founded on the opinions of competent surveyors as to the value of the property, and where he has submitted these opinions to the judgment of his client.(a)

24. When a law agent negotiates a loan by one of his clients to another, he occupies a very delicate situation, in which more than ordinary care and circumspection are required; and in his double capacity he is liable to both borrower and lender for any failure in his professional duties.(b) Where no other professional man is employed in the transaction than the agent of the borrower, the employment of such agent by the lender also will be readily inferred, even although no charge should have been made against the lender.(c) The position of an agent who acts for both the seller and the purchaser of heritable property, is equally delicate; for, on the one hand, the divulging of a client's secrets,(d) and, on the other, misrepresentations as to the nature of the title,(e) are relevant grounds for actions of damages. In one case, however, where an agent employed by both parties, having ascertained from the titles that the proposed seller had no right to the property, but that the right was in his son, made this known to the proposed purchaser, who completed the transaction with the son; it was held that the father, who admitted that he had no right to the property, had no claim of damages against the agent.(g)

Liability of agent for both parties.

25. A law agent through whose negligence documents are lost or mislaid, must make good any damage or expense thereby occasioned to his clients.(h)

Liability for losing documents.

(a) *Chapman v. Chapman*, 20 Jan. 1870, 9 Law Reports, Equity, 276.

(b) *Paris v. Smith*, 5 March 1823, 3 Mur. 332; *Sim v. Clarke*, 2 Dec. 1831, 10 S. 85, affirmed 1 July 1833, 6 W. & S. 452; *M'Leod v. M'Donald*, 22 Jan. 1835, 13 S. 287; *Haldane v. Donaldson*, 3 March 1836, 14 S. 610, affirmed 3 Aug. 1840, 1 Rob. 226.

(c) Cases *supra*, and *post*, p. 353 *et seq.*

(d) *Ante*, p. 321.

(e) *Ante*, pp. 296-7.

(g) *Bogle v. Cameron*, 16 Feb. 1844, 6 D. 682.

(h) Where an agent lost a process in which he had obtained decree in favour of his client, he was held liable to pay the amount decerned for; *M'Millan v. Gray*, 2 March 1820, 20 F.C. 110. Where a party sent a bill

Liability for
loss of
client's
money.

26. When a law agent transmits money belonging to his clients, he ought to take all the usual precautions to insure its safe delivery; otherwise he may be held responsible for its loss.⁽ⁱ⁾ Thus, where an agent who had recovered a sum of money for a client, sent it to him by a common carrier, without informing him by post how it was to be transmitted, he was held liable for the amount, the carrier having failed to deliver it,^(k) and he not having taken any step to procure payment from the carrier, or to attach his property. As the Post Office authorities now expressly caution the public not to transmit money or other valuables by unregistered letters, an agent will probably be held liable for loss arising from his neglecting to register a letter containing money or documents of debt.^(l) A law agent who pays the money of his clients into his own bank account, is bound to make good any loss arising from the failure of the bank.^(m)

to his agent, with instructions to attend to his claim on the estate of the acceptor, who had died, and the agent lost the bill, it was held that the agent was liable for the amount, and was not freed by the circumstance that his client had been appointed trustee on the estate of the acceptor's heir, and had not set apart any dividend for it, but had taken a discharge of his intrusions as trustee, and paid over to the heir, who disputed the debt contained in the bill, the balance in his hands; *M'Farlane's Exrs. v. Ferguson*, 26 June 1834, 12 S. 824, and 17 Feb. 1835, 13 S. 477. Where a parcel containing a process and title-deeds was mislaid for several years, owing to the negligence of the agent to whom it had been sent, or of some one for whom he was responsible, he was held liable for the expense of certain actions thereby occasioned; *Hunter v. Fairweather*, 1 March 1837, 15 S. 693. But where an action of damages was raised, after the lapse of twenty years, against an agent who had either lost or mislaid a bill, he was assoilzied; *Gillon v. Drummond*, 30 July 1724, M. 3532. See also *Reeve v. Palmer*, 25 June 1858, 5 Scott, Common Bench, N. S., 84.

⁽ⁱ⁾ 1 Bell's Com. 379.

^(k) *Mark v. Somerville*, 27 May 1800, Hume, 326.

^(l) See the case of *Andrews v. Drew & Maclure*, 23 Aug. 1859, 1 Scottish Law Journal, 102, where it was held by Sheriff Alison that the former practice of registration did not apply to bills which were not blank indorsed, but an opinion was expressed that a different rule would require to be applied in the case of neglect to register after the date of the caution given by the Post Office authorities.

^(m) 1 Bell's Com. 379; *Robinson v. Ward*, 25 Oct. 1825, 2 Carrington & Payne, 59.

27. Neither a factor acting gratuitously, *(n)* nor a *negotiorum gestor*, *(o)* is bound to use exact diligence, each being liable only for his actual intromissions; *(p)* or, at most, for very gross omissions. *(q)* But, on the other hand, a factor who is to be remunerated for his trouble is, in ordinary circumstances, bound to do diligence for the recovery of his constituent's rents, &c. *(r)* This, however, is not an absolute rule; for in one case, where a person employed as the general law agent of a relation, without any written authority, collected the rents of a small detached property which was let to inferior tenants, he was held not liable for arrears of rents lost by reason of his not having used diligence against tenants who had become insolvent, in respect that, although he received a factor-fee, it did not appear that he would have accepted the factory under an obligation to enforce payment of the rents by the use of ultimate diligence. *(s)* Partial intromission with the rents of an estate will generally render the intromitter liable for the whole rents, even where he has not acted under any written factory. *(t)* But a judicial factor has been held not bound to account for the back rents of a property which he had probable grounds for believing not to belong to the estate under his charge. *(u)* A factor employed to collect rents,

Liability of
factors.

(n) *E. of Wemyss v. Thomson*, 17 July 1762, M. 3515; *Irving v. Irving*, 8 Feb. 1701, M. 3517; *Sutherland v. Ross*, March 1683, M. 3516; *Lord Stranraer v. Gordon*, 8 Feb. 1677, 1 Br. Sup. 781. See also Bell's *Lectures on Conveyancing*, p. 425.

(o) *Bannatine's Trs. v. Cunninghame*, 12 Jan. 1872, 10 Macph. 319.

(p) *Ker v. Graham*, 4 March 1757, M. 3549, affirmed 9 March 1758, 2 Pat. App. 13.

(q) *Bannatine's Trs. v. Cunninghame*, *supra* *(o)*.

(r) *M'Caul v. Vareils*, 8 Feb. 1740, M. 3524; *Gibson v. Cochrane*, 18 July 1710, M. 3518; *M'Bride v. Melville*, 7 Jan. 1680, M. 2561 and 3516. See also *Lizar's Children v. Dickie's Reps.*, 27 Nov. 1760, M. 3532.

(s) *Macdoul v. Buchan*, 2 June 1817, 5 Dow, 127, and 6 Pat. App. 330.

(t) *D. of Queensberry v. Wilson*, March 1686, M. 3517; *Gibson v. Cochrane*, 18 July 1710, M. 3518.

(u) *D. of Roxburgh v. Swinton*, 2 March 1824, 2 Sh. Ap. 18. A cautioner for a factor is not liable for the latter's intromissions with rents

thus exacts payment.”(h) In the case of *Lillie v. Macdonald*,(i) an agent who had neglected to intimate an assignation was held liable in damages, twenty-five years after the date of the assignation, although the debt had been compensated and extinguished prior to the date of the assignation, so that intimation would have been nugatory. But the ground of this decision, as explained in the case of *Campbell v. Clason*,(k) was that, if the agent had performed his duty, by intimating the assignation to the alleged debtor, the latter would in all probability have warned the assignee that the debt was extinguished, or would have incurred some peril if he had *mala fide* omitted to do so; and that, had such warning been given, the assignee would not have relied upon the assignation, but might have found some means to secure himself. And in a subsequent case, where an agent employed to prepare an assignation in security had failed to intimate it, it was held not a relevant defence to an action of damages that, even if the assignation had been effectually completed, the pursuer would not have realised anything from the security, seeing that, if he had been informed of its worthlessness, he would not have lent out his money on the faith of it.(l)

Insolvency
of debtor no
defence.

34. But although it is a relevant defence that there was no debt truly due, it is irrelevant to allege that, on account of the insolvency of the debtor, nothing could have been recovered; for the law presumes that payment of a debt will be secured by the due enforcement of diligence, if not from the debtor himself, at least from his friends.(m).

(h) *Per* Lord Curriehill, in *Davidson v. Mackenzie*, 20 Dec. 1856, 19 D. 226. See also *Sinclair v. Wilson*, 12 Feb. 1829, 7 S. 401, reversed 7 Dec. 1830, 4 W. & S. 398.

(i) 13 Dec. 1816, 19 F.C. 234, affirmed 25 May 1819, 19 F.C. 772, and 1 Bligh, 315.

(k) 20 Dec. 1838, 1 D. 270.

(l) *Stuart v. Miller*, 12 Dec. 1840, 3 D. 255.

(m) *Chatto & Co. v. Marshall*, 17 Jan. 1811, 16 F.C. 121; *M'Millan v. Gray*, 2 March 1820, 20 F.C. 110; *M'Farlane's Exrs. v. Ferguson*, 26 June 1834, 12 S. 824, and 17 Feb. 1835, 13 S. 477. See also *Gray v. Mags. of Dumfries*, 7 Dec. 1780, M. 11,754; Note by the Lord Ordinary (Fullerton) in *Campbell v. Clason*, 20 Dec. 1838, 1 D. 270; and opinion of Lord Glenlee in *Murray v. Taylor*, 15 May 1828, 6 S. 802.

35. When a party has lost a debt through the fault of his agent, he will be barred from claiming damages, if he grants to the debtor a discharge comprehending the debt in question.⁽ⁿ⁾ In such circumstances, the agent occupies the position of a cautioner, against whom the creditor loses recourse by giving up a claim, and thereby rendering nugatory the right of the cautioner, on making payment, to an assignation, for the purpose of securing whatever relief may be competent to him. But where a bill was lost through the negligence of the creditor's agent, and the acceptor, taking advantage of the loss, denied that the debt was due, and the creditor having been thereafter appointed trustee on the estate of the acceptor's heir, did not set apart any dividend for the debt in question, but took a discharge of his intromissions as trustee, paying over to the heir the balance in his hands; the Court held that this did not amount to a discharge of the debt, on the ground that the creditor could not, of his own authority as trustee, assume the existence of a debt, liability for which was denied by the alleged debtor.^(o)

Action
barred by
discharge of
debt.

36. It is doubtful whether it is a relevant defence to an action of damages for negligence, or a legal blunder in a law agent's proceedings, that, owing to a previous blunder, for which he is not responsible, the proceedings in question must in any case have proved ineffectual. In an old case, where an agent had been guilty of two blunders, the first of which was held not actionable, as it was sanctioned by the general practice at the time, but the second of which was held relevant to infer damages, the agent pleaded, successfully, that as the justifiable error was fatal to the proceedings, no damages had been sustained through the blameable error.^(p) It can scarcely be supposed that the Court would now sustain such a plea, where both errors have been committed by the defender; but more difficulty arises in the case of the

Defence
founded on
vitiation of
proceedings
by a pre-
vious blun-
der.

(n) *Wallace v. Donald*, 13 Jan. 1825, 3 S. 433 (N. E. 304).

(o) *M'Farlane's Exrs. v. Ferguson*, 26 June 1834, 12 S. 824, and 17 Feb. 1835, 13 S. 477.

(p) *M'Lean v. Grant*, 15 Nov. 1805, M. App. Reparation, No. 2, and 1 Bell's Com. 460-1.

prior error having been committed by some one for whom the defender is not responsible. On the authority of the case above mentioned, Professor Bell states in his Commentaries, that "if a writer has committed an error which annuls the diligence, but it turns out that this diligence would, on another ground, have been ineffectual, he will be freed from responsibility;"(*q*) and opinions to the same effect have been expressed in more recent times.(*r*) But in the last case on the subject, the majority of the judges were of opinion, on a review of all the previous authorities, that a defence of this kind was irrelevant, in respect of the impracticability of ascertaining whether, if the defender had properly performed his duty, any other objection would have been stated, or persisted in, or successfully maintained.(*s*) The relevancy of the defence was, however, not actually decided, the Court being of opinion that the alleged prior defects did not render ineffectual the proceedings in question.

Claim for
reparation
cut off by
prescription
and *mora*.

37. A claim for reparation on the ground of professional liability is extinguished by the negative prescription of forty years. But the prescriptive period seems to run, not from the date when an error was committed, but from the date when it was discovered, or the validity of the agent's proceedings was challenged.(*t*) *Mora*, or delay short of the prescriptive period, may however bar such a claim, at least where the circumstances are sufficient to raise an inference of abandonment or acquiescence.(*u*) Thus, in the particular

(*q*) 1 Bell's Com. 461.

(*r*) *Per* Lord Newton in *Sinclair v. Wilson*, 12 Feb. 1829, 7 S. 401; and Lord Cuninghame in *Cooke v. Falconer's Reps.*, 26 Nov. 1850, 13 D. 157.

(*s*) *Davidson v. Mackenzie*, 20 Dec. 1856, 19 D. 226. See also *Guthrie Smith on Reparation*, p. 341.

(*t*) *Cooke v. Falconer's Reps.*, 26 Nov. 1850, 13 D. 157. See also *Lillie v. Macdonald*, 13 Dec. 1816, 19 F.C. 234, affirmed 25 May 1819, 1 Bligh, 315.

(*u*) In a recent case, where a party was held barred by a delay of twenty-five years from claiming reparation for injuries sustained through a railway accident, it was observed by Lord Benholme, that where a claim requires to be constituted, mere delay is sufficient to support a plea of *mora*, without an allegation of abandonment or acquiescence *Cook v. North British Railway Co.*, 1 March 1872, 10 Macph. 513.

circumstances of various cases, parties have been held barred from insisting in actions of damages against their agents after the lapse of thirty-nine,(x) twenty,(y) and seven years respectively.(z)

38. At the beginning of this century, a claim for reparation was regarded as partaking of the nature of a penal action; and it was therefore doubted whether such a claim was competent against the heirs of the wrongdoer.(a) But it is now quite settled that the representatives of a deceased law agent are liable in reparation to his clients for his negligence or want of skill;(b) and in a very large proportion of the cases referred to in this chapter, the defenders were the representatives of the agents through whose fault damages had been sustained. In one case it was held that a judicial factor, appointed under the 164th section of the Bankruptcy Act, on the estate of a deceased law agent, was bound to set aside and retain a dividend corresponding to a claim made by the trustees of a former client for £10,000 as damages sustained through the alleged negligence of the agent.(c)

Action may be brought against agent's representatives.

39. Notwithstanding some authority, to the effect that a

Agents liable for negligence, &c., only to their employers.

(x) *Cooke v. Falconer's Reps.*, *supra* (t).

(y) *Gillon v. Drummond*, 30 July 1724, M. 3532. See *ante*, p. 329. This case may be contrasted with *Lillie v. Macdonald*, *supra*, (t), where the lapse of twenty-five years after the agent's blunder was held no bar to the action, which was raised immediately after the blunder was discovered.

(z) *Hunter v. Fleming*, 11 Dec. 1829, 8 S. 234. The pursuer had purchased a property which his agent, the defender, informed him was burdened with an annuity to an elderly lady; he very soon thereafter discovered that the annuitant was only twenty-six years of age, but never intimated any claim of relief till shortly before raising the action. This case may be contrasted with *Banner v. Gibson*, 24 Nov. 1830, 9 S. 61, where a party, who had rendered himself liable to account for the amount of a bond, having been warned that he would be held responsible, an action against him six years thereafter was held not barred by the delay.

(a) *Syme v. Erskine*, 16 June 1801, M. Appx. Superior & Vassal, No. 3, and 22 July 1803, 4 Pat. App. 510.

(b) *Macnaughton v. Robertson*, 17 Feb. 1809, 15 F.C. 199; *Morrison v. Cameron*, 25 May 1809, 15 F.C. 279; *Bell's Prin.* § 546; *Guthrie Smith on Reparation*, p. 30; *Pothier, Traité du Contrat de Mandat*, § 130.

(c) *Wight's Trs. v. Jamieson*, 28 May 1863, 1 Macph. 815.

law agent's liability does not depend on who gives an order, but for whose behoof it is given, (d) it may now be regarded as a settled principle of law, that a law agent is not liable in damages, on the ground of negligence or want of professional skill, to third parties, between whom and himself there is no privity of contract; or, in other words, that a claim for reparation on these grounds is competent only to the party employing the law agent in the particular transaction in which the negligence or unskilfulness is alleged to have taken place. (e) This principle was however for the first time authoritatively laid down by the House of Lords in 1861, in the leading case of *Fleming v. Robertson*. The following were the circumstances of that case:—A party had instructed his agent to prepare a bond of relief and an assignation, in security, of a lease, in favour of several persons who had agreed to become cautioners for him in another obligation on condition that they should get security. The agent having neither intimated nor registered the deed before his client's insolvency, in consequence of which the security became unavailing, the Court of Session held him liable in damages to the cautioners. (g) But this judgment was reversed in the House of Lords by Lord Chancellor Campbell, Lord Cranworth, Lord Wensleydale, and Lord Chelmsford; (h) and the Lord Chancellor observed:

(d) *Per* Lord Glenlee in *Struthers v. Lang*, 2 Feb. 1826, 4 S. 418 (N. E. 421); Bell's Com. vol. i. 461; Bell's Prin. § 154; Ersk. iii. 3. 37. See also *Goldie v. Macdonald*, 4 Jan. 1757, M. 3527; and *Webster v. Young*, 20 Feb. 1851, 13 D. 752, the circumstances of which two cases are stated in the text, *post*, pp. 351 and 352.

(e) In addition to the cases referred to *infra*, see Addison on Contracts, 6th edition, p. 401; and Story on Agency, § 308. In the English case of *Parker v. Rolls* (10 May 1854, 14 Scott, Common Bench, 691) it was taken for granted that the denial of a retainer was a sufficient defence to an action of damages for professional negligence; and in the more recent case of *Fish v. Kelly* (25 May 1864, 17 Scott, Common Bench, N. S., 194) it was held that an attorney was not liable to an action for negligence in giving mistaken legal advice, in answer to a casual inquiry by one between whom and himself the relation of attorney and client did not exist.

(g) *Fleming v. Robertson*, 17 June 1859, 21 D. 982.

(h) 30 May 1861, 4 Macq. 167, and 23 D. (H.L.) 8.

—"I never had any doubt of the unsoundness of the doctrine that A employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C, if, through the gross negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B, and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science." (i)

40. Although the doctrine, that a law agent is not liable to any one but his employer for negligence or want of professional skill, was for the first time clearly enunciated in the case of *Fleming v. Robertson*, it is supported by a good number of previous decisions. Thus, where the factor of a proprietor who was supposed to have been drowned while absent from this country, accepted of a mandate from the proprietor's sister to make up her titles to her brother's estate, but delayed doing so, in consequence of which the lady's husband lost the liferent of the estate to which he would otherwise have been entitled on her death, the House of Lords, reversing the judgment of the Court of Session, held that the factor was not liable in damages to the husband, there being no proof that the delay arose from any fraud or *mala fides*. (k) In a subsequent case, a sale of

Cases prior to *Fleming v. Robertson* supporting the same principle.

(i) 4 Macq. 177.

(k) *Thomson v. Somerville*, 19 May 1815, 18 F.C. 362, reversed 8 June 1818, 6 Pat. App. 393. No reasons for the reversal are stated in the report; but the appellant's argument, to which we may presume effect was given by the judgment of the House of Lords, was that there was no proof of *mala fides*, that the delay arose from rumours that the proprietor was not dead, that in his whole proceedings as factor for the deceased he had been guided by a conscientious sense of duty to his absent constituent, and that he acted according to the advice of eminent counsel, and with no fraudulent intention to injure the pursuer.

entailed lands under 42 Geo. III. c. 116, for redemption of the land-tax, having been set aside on account of certain irregularities, the agent of the seller, who had also acted as trustee in terms of the statute, was held not bound to indemnify the purchasers.^(l) Again, the agent of the trustee in a sequestration having raised an action for payment of his account against the creditors (who, as the law then stood, were directly liable to him) they defended it on the ground that he had neglected directions given by them to the trustee, and inserted by the agent in the *sede-runt* book, to sue for payment of a debt and to obtain a vendition of the share of a ship, in consequence of which neglect the debt and the price of the share had been lost; but the Court repelled the defence, holding that the agent was not bound to take any steps without instructions from his employer, the trustee in the sequestration.^(m) In another case, the agent of an annuitant having uplifted, under a claim by his client in a *multiplepoinding*, the proceeds of a property on which the annuity was secured, and applied them in extinction of arrears and future payments, he was held not responsible, on the death of his client, to a substitute annuitant for the value of the annuity.⁽ⁿ⁾ Lastly,

(l) *Wilson v. Riddell*, 20 June 1826, 1 F. 707, 4 S. 732 (N. E. 739). The interlocutor of the Lord Ordinary (Medwyn) contains the following finding, to which the Court adhered:—"Finds that the pursuers in the action of relief have no direct action against the defender for his conduct as the agent for Sir William Elliot" (the seller); "and that their own agents were bound to examine and satisfy themselves as to the validity of the titles under which their purchases were made; and although that title has turned out bad, the claim for redress lies against the seller, and may lie against their own agents, but cannot lie against the private agent of the seller for mere professional mistakes or inadvertencies."

(m) *Young v. Robertson*, 6 March 1827, 5 S. 502 (N. E. 472).

(n) *Buchanan v. Pearson*, 19 June 1840, 2 D. 1177. Three defences were stated by the agent—(1) that he was not employed by the pursuer; (2) that the pursuer had sustained no damage, as the arrears of annuity and the annuity for the four years during which the first annuitant survived, more than exhausted the amount drawn in the *multiplepoinding*; and (3) that the pursuer had homologated and approved of what was done. The Lord Ordinary sustained all of these defences; and the Court adhered, intimating, however, that they proceeded upon the special cir-

an agent employed to obtain a client infest having bungled the sasine, in consequence of which the client's widow lost her right of terce, she was held to have no claim for reparation against her husband's agent.(o)

41. There is nothing in any of these decisions that can be supposed to derogate from the right of a client's representatives to vindicate a claim of damages that existed in the person of the client himself, in consequence of the negligence or unskilfulness of his agent;(p) and it appears to be immaterial whether a vested right to claim reparation is transmitted to an heir by the operation of law, or is conveyed by deed to a third party.(q) This is well illustrated by the case of *Goldie v. Macdonald*, which was decided in 1757. A party who was entitled as one of the next of kin to a share of the intestate moveable succession of a deceased uncle, granted a factory to John Henderson (who had been educated as a writer, and was acting as factor to a nobleman), to get him confirmed as joint executor with his brother; and he thereafter assigned to his wife all his debts and effects, and particularly his share of the executry. After his death it was found that Henderson had neglected to take out confirmation, in consequence of which, as the law then stood, no right to the executry vested in his employer, whose widow thus lost the share to which she would otherwise have been

Claim for reparation vested in client transmits to his representatives.

cumstances of the case. It was specially observed that the first annuitant had a preferable right, which sufficed to exhaust the whole fund.

(o) *Goldie v. Goldie*, 8 July 1842, 4 D. 1489. This case was attended with the specialty that the intention of the husband was that his widow should not get terce; but the principle that an agent cannot be responsible to a person by whom he was never employed was recognised by the Lord Ordinary (Cuninghame), Lord President Boyle, and Lord Gillies.

(p) See opinions of Lord Ordinary Cuninghame and Lord President Boyle in *Goldie v. Goldie*, 8 July 1842, 4 D. 1489. See also *Knights v. Quarles*, 14 June 1820, 4 Moore, 532, where it was held that when damage has accrued to a testator in his lifetime, his executor may sue.

(q) See opinion of Lord Fullerton in *Goldie v. Goldie*, *supra*. The claim of a client for reparation passes, on his bankruptcy, to the trustee in his sequestration, even where such claim comprehends *solatium* for wounded feelings, as well as compensation for actual loss; *Thom v. Bridges*, 11 March 1857, 19 D. 721.

entitled under the assignation in her favour. For this neglect the Court held Henderson liable to her in damages.^(r) "It is obvious that this decision proceeded on the intelligible principle that the widow had succeeded to the rights of her deceased husband, and was therefore in the same position as she would have been in if she had been the person employing Henderson. Of the correctness of this decision there could be no doubt."^(s)

Agent not
liable to dis-
appointed
legatees or
benefi-
ciaries.

42. Although it has never been actually decided that, when a law agent is employed to prepare a settlement which is rendered inoperative through a professional blunder, he is not liable to the disponees or legatees for the loss which they sustain by the nullity of the deed, yet, having regard to the strong expression of opinion by the House of Lords in *Fleming v. Robertson*, and to the analogous cases above referred to, there can be little doubt that an agent will not now be subjected to so serious a responsibility. The contrary opinion seems, however, to have been taken for granted by the Second Division in the prior case of *Webster v. Young*.^(t) This was an action of damages against an agent on the ground that he had been instructed to prepare and present for signature a codicil in favour of the pursuer; that he wrongfully and improperly retained the extended but unsigned codicil in his own custody till after the death of the testator, which occurred two years after the codicil had been extended; and failed, either of purpose or through culpable negligence, to present or transmit the codicil to the testator, who never altered his intentions towards the pursuer, and believed that the deed had been signed. The Court allowed a proof before answer as to the relevancy of the pursuer's averments. The Lord Ordinary (Wood) had held that nothing had been averred which could infer liability on the part of the defender; but none of their Lordships of the Second Division seemed to have any doubt that a beneficiary

(r) *Goldie v. Macdonald*, 4 Jan. 1757, M. 3527.

(s) *Per* Lord Cranworth in *Fleming v. Robertson*, *supra*, 4 Macq. 190. See also the opinions in *Goldie v. Goldie*, *supra* (p).

(t) 20 Feb. 1851, 13 D. 752.

under an incomplete deed may have a good action against the agent through whose neglect it remains uncompleted, though Lord Medwyn thought that the pursuer's averments were not sufficiently specific in regard to the testator's intentions having remained unaltered down to the date of his death. As, however, proof was allowed before answer as to the relevancy, these opinions cannot be regarded as more than *obiter dicta*; and the case of *Webster v. Young* can now be regarded as an authority only to this extent, that a law agent who purposely delays to get a deed prepared or executed is liable *ex delicto* to the parties thereby injured.

43. "But if in a transaction of borrowing and lending money on security, A, the borrower, employs B, a professional lawyer, to transact the business, in which both A, the borrower, and C, the lender, have their separate interests, and for which A alone is to pay B, although C has no personal intercourse with B, if from the instructions expressly given by A to B, or from the usual course in which such business is conducted, B knows that he, and no other professional lawyer, is employed in the transaction, and that B is to act both for A and for C in preparing the security, I apprehend that a jury, from this employment of B, might infer an undertaking from B to C to conduct the transaction on his part with reasonable skill and diligence."^(u) Thus, in the case of *Struthers v. Lang* the House of Lords, affirming the judgment of the Court of Session, held that the law agent of the borrower in a loan transaction was liable to the lenders, who were not represented in the transaction by any other legal adviser, and who had at least occasionally employed the borrower's agent in other matters of business, for loss arising from the heritable security having been ineffectually completed.^(x) And in the subsequent case of *Haldane v.*

Liability of agent of borrower to lender who has no other agent.

(u) *Per* Lord Chancellor Campbell in *Fleming v. Robertson*, 25 June 1861, 4 Macq. 177. See also Bell's Prin. § 154, and 1 Bell's Com. 461.

(x) *Struthers v. Lang*, 2 Feb. 1826, 4 S. 418 (N. E. 421), 1 F. 307, affirmed 28 May 1827, 2 W. & S. 563. In the case of *Fleming v. Robertson*, *supra*, 4 Macq. 196, Lord Cranworth observed,—“What were the precise grounds on which the House acted in *Lang v. Struthers* cannot be ascertained. It seems to have been assumed to be clear that *Lang* acted

Donaldson, an agent was held to have acted for the lenders as well as the borrower, although he had not made any charge against the former for his professional services; and he was found liable to the lenders for the amount of the sum lent, in respect that he did not inform them that the property on the security of which the money was advanced was incumbered with prior burdens, which, on the property becoming depreciated, more than exhausted its value.(y)

for both parties, and that the only question was whether he had been guilty of neglect. And certainly there was an abundance of facts stated to show that Lang was acting as the law adviser of the lenders as well as of the borrower."

(y) *Haldane v. Donaldson*, 3 Mar. 1836, 14 S. 610, affirmed 3 Aug. 1840, 1 Rob. 236, and 7 Clarke & Finnelly, 762. See also *Sim v. Clarke*, 2 Dec. 1831, 10 S. 85, affirmed 1 July 1833, 6 W. & S. 452, where the agent was admittedly employed by all the parties.

CHAPTER XXIII.

SUMMARY PROCEEDINGS AGAINST LAW AGENTS.

1. As law agents are officers of the courts to which they have been admitted, they are amenable at common law to the summary jurisdiction and control of the judges before whom they practise, a sentence pronounced by an inferior judge being, however, subject to the review of the Court of Session.^(a) Hence, not only may they be censured or punished for contempt of court,^(b) but they may also be found personally liable in expenses,^(c) or even be imprisoned on a summary warrant till payment of witnesses or havers adduced by them,^(d) or till the return of processes borrowed by them or their clerks.^(e) As has been already stated in another chapter,^(f) an agent authorising or permitting his name to be used in judicial proceedings by an unqualified

Law Agents
amenable to
summary
jurisdiction
of the Court.

(a) *Bankton*, iv. 3. 32; *Hamilton v. Anderson*, 11 June 1856, 18 D. 1003, affirmed 18 June 1858, 20 D. (H. L.) 16, 3 Macq. 363; *Colquhoun v. Paterson*, 8 March 1850, 12 D. 851.

(b) *Lord Advocate v. Jameson*, 1 Feb. 1822, 1 S. 285 (N. E. 264); *Gilfillan v. Ure*, 18 May 1824, 3 S. 21 (N. E. 15); *McLauchlan v. Carson*, 16 Dec. 1826, 5 S. 147 (N. E. 133); *Spalding v. Lawrie*, 7 July 1836, 14 S. 1102.

(c) *Ante*, pp. 299-302.

(d) *Ante*, p. 288.

(e) *Ante*, pp. 71 and 305; *Shand's Practice of the Court of Session*, pp. 119, 286, and 512; *Dove Wilson's Sheriff-Court Practice*, p. 192; *McGlashan's Sheriff-Court Practice*, 4th ed., pp. 85 and 317.

(f) *Ante*, p. 61.

CHAPTER XXIV.

DUTIES OF LAW AGENTS.

Only a summary of duties is given in this chapter.

1. Although most of the duties of law agents have already been at least incidentally mentioned, and several of them fully considered, it may not be thought superfluous to present in a separate chapter a summary of such duties as are not generally treated of in the text books on court practice and conveyancing.

Duties preliminary to practising.

2. A law agent ought on no account to attempt to practise in court until he has been duly admitted(*a*) and enrolled, and has signed the roll of agents practising in such court.(*b*) Before beginning to practise, he must also take out, and get recorded in the register kept for the purpose, a stamped certificate or license, which should be renewed between 31st October and 1st December in each year thereafter.(*c*)

Duty to accept and continue in employment.

3. A practising law agent ought not to refuse to act for an intending client(*d*) who is *sui juris*,(*e*) unless he has a reasonable excuse ;(*g*) and having once undertaken to con-

(*a*) *Ante*, pp. 41 and 59.

(*b*) *Ante*, p. 51.

(*c*) *Ante*, p. 52. Enrolment and signing the rolls are not required till 1st Feb. 1874.

(*d*) See *ante*, p. 7; Bankton, iv. 3. 17; and opinion of Lord President Hope in *Johnstone v. Scott*, 4 Jan. 1829, 7 S. 234. The English rule seems to be that an attorney cannot be compelled to act for any one unless he has undertaken to do so, or accepted a retainer; *Anonymous*, 1 Salkeld, 87, pl. 4; Pulling's Law of Attorneys, 5th ed., p. 91.

(*e*) *Ante*, p. 78.

(*g*) As to what will be regarded as a reasonable excuse, see *ante*, p. 113 note (*r*), and p. 299.

considered proved.(*k*) A petition and complaint at the instance of an advocate against a law agent for payment of fees recovered by the agent, was dismissed as incompetent, in respect that it contained no conclusion for the censure or punishment of the respondent.(*l*)

3. A law agent's misconduct, incidentally brought to light in the course of an action, may be dealt with at the discretion of the Court. Thus, where it appeared in an action of reduction-improbation that a procurator had advised his client to use the deed produced, though he believed it to be forged, the Court suspended him for six months from practising in any of the inferior courts.(*m*) In one case the conduct of a member of the Society of Solicitors in the Supreme Courts was recommended to the consideration of the Preses of that Society;(*n*) and in another a remit was made to a sheriff to inquire into the conduct of a procurator practising in his court.(*o*)

4. Both the Procurators Act of 1865(*p*) and the Solicitors Act of 1871(*q*) contained various provisions in regard to the suspension and deprivation of agents on the grounds of misconduct. These, however, have been superseded by the Law Agents Act of 1873, which provides that "every enrolled law agent shall be subject to the jurisdiction of the Court" (*i.e.*, the Court of Session) "in any complaint which may be made against him for misconduct as a law agent, and it shall be lawful for the Court, in either Division thereof, to deal summarily with any such complaint and to do therein as shall be just;"(*r*) and also that "the name of any person shall be struck off the said rolls—1, in obedience to the order of the Court, upon application duly made, and after hearing

Misconduct
incidentally
brought to
light.

Striking
law agent's
name off the
rolls.

(*k*) *Jack v. Pearson*, 11 Feb. 1824, 2 S. 691 (N. E. 581); in the House of Lords, 28 June 1825, 1 W. & S. 577.

(*l*) *Bell v. Jameson*, 24 June 1848, 10 D. 1413.

(*m*) A. S. 11 and 23 Feb. 1763.

(*n*) *Manson v. Clyne*, 30 June 1831, 9 S. 853. See also *Steven's Trs. v. Fraser*, 8 March 1836, 14 S. 676.

(*o*) *Ritchie v. Macrosty*, 14 Feb. 1854, 16 D. 554.

(*p*) 28 and 29 Vict. c. 85, §§ 24, 25, and 26. See Appendix.

(*q*) 34 and 35 Vict. c. cvii. (Local), § 29. See Appendix.

(*r*) 36 and 37 Vict. c. 63, § 22. See Appendix.

parties, or giving them an opportunity of being heard; 2, upon his own written application.”(s) The Procurators Act is repealed from and after 1st February 1874,(t) but it is declared that, “except in so far as relates to striking the name of any person off the roll of law agents, nothing in this Act shall be held to affect the existing powers of inferior courts or the judges thereof over procurators practising before such courts, so far as these powers may be necessary for supporting the jurisdiction and maintaining the authority of their several courts.”(u)

Law of
England as
to striking
attorney's
name off the
rolls.

5. In England this summary jurisdiction is generally exercised where an attorney has been improperly admitted,(x) or has been guilty of a crime or misdemeanour, of gross misconduct, or of gross negligence and unskilfulness.(y) It is not necessary that the misconduct should have occurred in the course of an attorney's professional practice.(z) The striking of an attorney's name off the rolls does not necessarily create a perpetual disability; for after the lapse of some time he may be readmitted, if his offence has been attended with extenuating circumstances, and his subsequent conduct proves him to be deserving of lenity.(a)

Effect of
having
name struck
off the rolls.

6. After a law agent's name has been struck off the rolls he cannot practise as an agent in the Court of Session or any sheriff-court till his name has been restored thereto.(b)

(s) Sect. 14 of the Law Agents Act.

(t) Sect. 25.

(u) Sect. 26. See also *ante*, p. 61; and *Hamilton v. Anderson*, 11 June 1856, 18 D. 1003, affirmed 18 June 1858, 20 D. (H. L.) 16, 3 Macq. 363.

(x) *Ante*, p. 25.

(y) *Lush's Practice*, 3d ed. p. 320; *Chitty's Archbold's Practice*, 12th ed. p. 147; *Pulling's Law of Attorneys*, 5th ed., p. 463.

(z) *In re Blake*, 7 June 1860, 30 Law Journal, Queen's Bench, 32; and treatises *supra* (y).

(a) *Chitty's Archbold's Practice*, 12th ed. p. 154; *Pulling's Law of Attorneys*, 5th ed. p. 478; *In re Poole*, 8 May 1869, 4 Law Reports, Common Pleas, 350.

(b) “From and after the first day of February eighteen hundred and seventy-four no person shall be allowed to practise as an agent in the Court of Session or any sheriff-court until he shall have subscribed the roll of agents practising before such court, or after his name shall have been struck off such roll unless the same shall have been subsequently restored thereto.”—36 and 37 Vict. c. 63, § 16.

When his name has been struck off upon his own application, his re-admission, if unopposed, will probably be a matter of course. An agent who continues to practise after his name has been struck off the roll will be regarded as an unqualified practitioner, and be subject to severe punishment.(c)

7. A summary petition may be competently presented against a law agent for delivery of documents improperly retained by him.(d) But if the agent is not a member of any court, an ordinary action is the proper remedy; and in such a case he is amenable to the jurisdiction within which he has received the documents, that being held to be the place in which he became bound to restore them.(e) A summary petition for delivery of documents may be at the instance of a client, or his representatives,(g) or any other party to whom such documents belong;(h) and an agent is not entitled to raise any question with a client, as to the property of a deed which has been placed in his possession by his client as one of his, the client's, titles.(i) It is, of

Summary
petition for
delivery of
documents

(c) Lord Advocate *v.* Hunter, 5 March 1833, 11 S. 514. See also *ante*, p. 60.

(d) Hay *v.* Taylor, 27 Feb. 1777, 5 Br. Sup. 605; Fenwick *v.* Dow, 24 Feb. 1826, 4 S. 495 (N. E. 500). See also M'Kirdy *v.* M'Lachlan, 26 May 1840, 2 D. 949; and M'Glashan's Sheriff-Court Practice, 4th edition, p. 384.

(e) Ritchie *v.* Wilson, 15 Feb. 1828, 6 S. 552.

(g) In a recent case the Court held that an agent was not bound to deliver title-deeds to the heir-at-law of a client, until the heir had expedite a service to his ancestor; Smith *v.* Jackson, 8 Dec. 1871, 10 Macph. 211.

(h) Burnet *v.* Morrow, 26 March 1864, 2 Macph. 929. An agent employed by a bondholder to prepare and record an assignation, retained it in his own custody after recording it. The assignee presented an application to the Sheriff for delivery of the bond and the assignation. This was resisted by the agent, on the ground that he had not been instructed by his client to deliver the deeds to the assignee, and that his client alleged that no valuable consideration had been given by the assignee. The Sheriff having ordained the agent to deliver the deeds, he referred the whole cause to the oath of the petitioner, who deposed that at the date of the assignation he did not pay the sum therein stated as the consideration money, but that that sum was advanced on several occasions. This oath was held to be negative of the reference, and the agent was ordained to deliver up the deeds to the petitioner.

(i) Marshall *v.* Molison, 7 Dec. 1864, 2 Macph. 191.

course, a sufficient defence to a petition for delivery of documents, that the agent has a lien or hypothec over them; *(k)* but this defence may be obviated by a tender of payment of his business accounts, *(l)* or of consignment of their amount, *(m)* or, in some cases, by a reservation of his right of hypothec. *(n)* An agent has been held not bound to give up a forged receipt retained by him on its being presented for payment. *(o)*

Petition for
payment of
money.

8. A summary petition is also competent against a law agent for payment of a sum of money recovered by him for a client (the agent's account being paid), *(p)* or for repetition of money placed in an agent's hands for a special purpose, to which it may not have been applied, or of any balance that may remain after the purpose has been fulfilled, whatever counter claims the agent may have. *(q)* A petition which virtually resolves into an action of count and reckoning, is incompetent; *(r)* but a client has been allowed to crave in this summary form for payment of the proceeds of a poinding and sale, received for him by his agents, under deduction of any counter account which they might have against him. *(s)* A summary application for taxation of an

(k) *Ante*, p. 204.

(l) *Burnet v. Morrow*, *supra* *(h)*.

(m) *Ante*, p. 217.

(n) *Ante*, pp. 218-9.

(o) *Gray v. M'Dougal*, 31 Jan. 1828, 6 S. 467.

(p) *Fenwick v. Dow*, 24 Feb. 1826, 4 S. 495 (N. E. 500).

(q) *Scott v. A. B.*, 10 March 1836, 14 S. 682; *Hendry v. Grant & Jameson*, 27 May 1868, 5 Scot. Law Rep., 544. See also *Stewart v. Bogle*, 1 Dec. 1801, 4 Pat. App. 265; and *Campbell v. Little*, 13 Nov. 1823, 2 S. 484 (N. E. 429).

(r) *Berry v. Wallace*, 12 Feb. 1830, 8 S. 509. A trustee on a sequestrated estate applied by summary petition to the Court for an order on the agent in the sequestration instantly to lodge a full state of his whole intromissions and accounts, and to make a complete production of his vouchers and of all papers connected with the estate. This application was held to be incompetent, and the trustee was found personally liable in expenses. See also *Bell v. Jameson*, *ante*, p. 357.

(s) *Graham v. Lang*, 20 Feb. 1850, 12 D. 754. The following is the concluding part of the interlocutor pronounced by the Court:—"And in respect that the petition is not an attempt to use that summary remedy a

account for conducting judicial proceedings, is competent to the client as well as to the agent.(t)

an ordinary action for money had and received for another, but is presented to the Sheriff by agents practising before him, and employed in a process of diligence still in dependence, in order to compel them to hand over to their employer money which they received in the execution of that diligence for him, and as on his account, Repel the objection to the competency of the petition."

(t) *Ante*, p. 178, *et seq.*

Books and
accounts.

17. A law agent ought to keep regular and accurate books.(o) Letters for which he charges must be fully booked.(p) He is, moreover, bound to make out and render his accounts at his own expense, whenever required by his clients to do so; and the accounts should be fair transcripts of the entries in his books.(q) Vouchers for disbursements must be preserved, and exhibited if required.(r) When business accounts are rendered, the client should be informed of his right to get them taxed before payment;(s) and an agent should not take decree in absence against a client for the amount of such accounts, without getting them taxed.(t)

Money of
clients.

18. A law agent employed as a factor in the collection of rents, &c., must do diligence where required for their recovery, or obtain his constituent's consent to his not doing so.(u) A client's money, if the amount is at all considerable, should be kept in a separate bank account;(x) and in remitting it, every usual and reasonable precaution should be adopted.(y)

Disburse-
ments.

19. In conducting a client's business, a law agent ought not to make disbursements which are unreasonable or unnecessary, unless they have been expressly directed or authorised by the client,(z) and it should be borne in mind by an agent acting for a wife in a consistorial action, that he is not entitled to recover from the husband any but reasonable and proper disbursements.(a)

(o) *Ante*, p. 130. As to the duty of a law agent to prevent any unnecessary disclosure of his client's affairs, by exposing his business books, see opinion of Lord Justice-Clerk Inglis in *Buchanan v. Cullen*, 16 Jan. 1863, 1 Macph. 258.

(p) *Ante*, p. 171, *note*. See also *Campbell v. Davidson*, 14 March 1827, 4 Mur. 173, where the letter-book of a deceased law agent was admitted to prove that the draft of a deed was transmitted to a party.

(q) *Ante*, pp. 130, 131.

(r) *Ante*, p. 169.

(s) *Ante*, p. 163 *et seq.*

(t) *Ante*, p. 165.

(u) *Ante*, p. 337.

(x) *Ante*, p. 336. See also *Warren's Duties of Attorneys*, 2nd ed., p. 361.

(y) *Ante*, p. 336.

(z) *Ante*, pp. 121, 172.

(a) *Ante*, pp. 162 and 175.

20. A law agent is, of course, bound to render a complete account of his intromissions with the funds or property of a client, whether as factor or as agent. *(b)* He must pay to, or place to the credit of, his employer, whatever money he has recovered for him; *(c)* and when he receives money for a special purpose, he is bound to apply it to that purpose, and to return any balance that may remain, whatever counter-claim he may have. *(d)* A factor or agent is not entitled to dispute the title of his constituent or client, under whose appointment he has collected or recovered funds. *(e)*

Accounting
with client.

21. It is the duty of a law agent to keep his client's title-deeds and papers in proper and reasonable order, *(g)* to take care not to mislay or lose them, *(h)* and to deliver them up when duly required, *(i)* his business accounts being paid. *(k)* He is not entitled to raise any question as to the property of a deed placed in his possession by a client as one of his titles, or to use such deed for any other than his client's purposes. *(l)*

Papers of
clients.

22. Before raising an action, a law agent ought to make proper investigation and inquiry into all the circumstances of the case, *(m)* and not to rest satisfied with the mere representations of his client. *(n)* It is the duty of a law agent to

Duties be-
fore raising
an action.

(b) *Cunninghame v. Cunninghame*, 28 Feb. 1837, 15 S. 687; *Macenzie v. Brodie*, 19 March 1859, 21 D. 804; *Moffats v. Underwood*, 23 Nov. 1860, 23 D. 48; *Pothier, Traité du Contrat de Mandat*, § 132.

(c) *Chalmers v. Innes & Hope*, 7 March 1766, M. 8489. See also *ante*, p. 360.

(d) *Ante*, pp. 131-2, and 360.

(e) *Maxwell v. Sharp*, 10 May 1721, *Robertson's Appeal Cases*, 380; *Arbouin v. Sime*, 25 June 1824, 3 S. 184 (N. E. 125).

(g) *North-Western Railway Co. v. Sharp*, 7 Nov. 1854, 24 *Law Journal*, *Exchequer*, 82.

(h) *Ante*, § 25.

(i) *Ante*, p. 359. As to the duty of an agent with whom a client has deposited a sealed packet, which is to be destroyed in case of the depositor's death before a certain day or the occurrence of a certain event, see *Logan v. Logan*, 27 Feb. 1823, 2 S. 253 (N. E. 222).

(k) *Ante*, p. 204 *et seq.*

(l) *Marshall v. Mollison*, 7 Dec. 1864, 3 *Macph.* 191.

(m) *Ante*, p. 162.

(n) *Warren's Duties of Attorneys*, 2d ed., p. 352; and *post*, p. 372.

dissuade a client from raising a frivolous action,(o) or one in which he can recover only nominal damages,(p) and to warn him of the liabilities that he may incur through the wrongous use of diligence and *ex parte* proceedings.(q) When a party lends the use of his name to carry on legal proceedings in which he has no substantial interest, his agent ought to obtain for him an obligation of relief of costs or damages.(r)

Acting
under
advice of
counsel.

23. In the conduct of litigation, law agents should act under the advice of the counsel whom they employ;(s) and even in extrajudicial business it is often their duty to take the opinion of counsel on a full and correct statement of the facts.(t) But in matters which fall within the ordinary scope of a law agent's employment, he ought not to attempt to get rid of his professional responsibility at the expense of his clients, unless really difficult legal questions are involved.(u)

Professional
intercourse
with coun-
sel.

24. The selection of counsel is the right and duty of the agent intrusted with the conduct of a cause.(x) On so delicate a subject as professional intercourse with members of the bar, it would be impossible to do better than quote the follow-

(o) *Cockle v. Whiting*, 20 Nov. 1829, 1 Russell & Mylne, 43. See also Warren's Duties of Attorneys, 2d ed., p. 39.

(p) *Jacks v. Bell*, 29 Feb. 1828, 3 Carrington & Payne, 316.

(q) *Ante*, pp. 303-309. See also *Allison v. Rayner*, 17 Nov. 1827, 7 Barnewall & Cresswell, 441; and *Jacks v. Bell*, 29 Feb. 1828, 3 Carrington & Payne, 316.

(r) *Graham v. Lawrence*, 1858, 1 Foster & Finlason, 285. See also *ante*, p. 85.

(s) *Ante*, p. 323.

(t) *Ante*, p. 323, note (d).

(u) *Ante*, p. 324.

(x) "Keep in your own hands, gentlemen, as one of your most important rights, the selection of your counsel. Who is answerable for the success of the action or suit? You, or your client? Yourselves; and you have a right which no client that was not a fool would venture to question, to fix on that counsel, or those counsel, whom you believe in the undisturbed exercise of your discretion best qualified to conduct your cause. I know that you are often harrassed by unseemly importunities on such occasions; but it is your duty to be firm, and to remind those who would thus trespass on your province that it is you, and not they, who

ing passage from the Lectures of Mr Samuel Warren, Q.C., on the duties of attorneys:—"We highly appreciate straightforward independence of manner and conduct in you towards ourselves, and would wish to be treated by you exactly as we wish to treat you—namely, as gentlemen, and concerned equally with ourselves in administering law and justice. When either of us for a moment forgets that, he is degraded from a high position, and he who does not so forget, has a right to despise him who does. Do not attempt, but neither do you permit, undue familiarity. Should any member of the bar so grossly forget himself as to attempt to *court* you, to seek to ingratiate himself with you, and gain your confidence, by illicit means, scornfully repel his advances; for, rely upon it, such conduct only disgraces and injures both parties to it. The heads of each branch of the profession, whose intercourse is one regulated by honourable cordiality and reciprocal respect,—indeed, all the high-minded members of both departments, will sternly echo my words, and say that those guilty of such meanness have forfeited all claim to the title of gentlemen; have done their utmost to bring their brethren into discredit,—to sully the honour and impair the dignity of a distinguished profession."(y)

"Regard fees to counsel as a *debt of honour*, the payment of which is a matter of peculiarly stringent obligation amongst gentlemen. Counsel have no means of compelling the performance of that duty, if once they have taken the brief, in reliance on your afterwards paying the fee, which, in point of strictness, ought always to be paid with the brief."(z)

25. A law agent employed to conduct an action must make himself acquainted with the cause and ascertain by what evidence it may be supported.(a) He is, of course, bound to make all the requisite preparations for a proof or trial, viz., precognosce and cite the necessary witnesses, in-

Preparations for trial.

are charged with the responsibility of conducting the cause to a successful issue."—Warren's Duties of Attorneys, 2d ed., p. 283.

(y) 2d edition, p. 106.

(z) 2d edition, p. 344.

(a) *Gill v. Lougher*, 1830, 1 Crompton & Jarvis, 170.

struct counsel properly when their assistance is required, and attend either personally or by a competent clerk.(b) The precognition of witnesses is a very important and often a difficult duty,(c) which in many cases ought to be undertaken before an action is raised.(d) A law agent is bound to use due and proper care in the employment of skilled witnesses whose evidence may be material.(e) When the testimony of particular witnesses is of great importance, inquiry should be made into their character and reputation. In the case of a trial by jury, it is farther expedient to make inquiries as to those summoned as jurors, in order to be able to challenge such as may reasonably be supposed to be unfavourably biassed.(g)

(b) *Ante*, p. 325.

(c) Reference should be made to the excellent remarks on the precognition of witnesses in M'Glashan's *Sheriff-court Practice*, 4th ed., p. 222. The following passage from Warren's *Duties of Attorneys*, 2d ed., p. 267, is well worthy of quotation:—"Exercise the utmost caution in dealing with your proposed witness, when you are inquiring from him what he knows concerning the facts, and taking down his evidence. Do not suggest except to guide his memory, but *enquire*—and with judgment. Do not attempt to lead him towards a favourable view of the case; be on your guard against saying or doing anything which may have, or seem to have, that tendency. Content yourself with asking him, but as closely and particularly as you choose, what he knows of the transaction, and let him tell his own story; and take down *his own expressions*, as nearly as possible—a matter this of great importance,—however quaint and vulgar they may be, falling short only of grossness. Do not transmute his 'round unvarnished tale' into a fine-spun statement which may suggest to counsel a mode of examining him which may prove both embarrassing to the witness and dangerous to the interests of your client. And when the witness has to speak to conversation, do not give the result or a summary of the conversation to which he will or is expected to speak, but have as far as possible the *ipsissima verba*."

(d) "An attorney who allows his client to proceed without pointing out to him the expediency of ascertaining the evidence, and that in the *very first instance*, is guilty of *grossly absurd and culpable negligence*."—*Per Lord Tenterden*, in an anonymous case, in 1828, cited 2 Chitty's *General Practice*, ch. 1, p. 22, note, and Pulling's *Law of Attorneys*, 5th ed., p. 174, note. See also Dove Wilson's *Sheriff-Court Practice*, p. 95.

(e) *Mercer v. King*, 1859, 1 Foster & Finlason, 490. See also Neilson v. Barclay, 19 July 1870, 8 Macph. 101, as to precognosing scientific witnesses.

(g) Warren's *Duties of Attorneys*, 2d ed., p. 279.

26. One of the most delicate and difficult duties that a law agent can be called on to discharge, is to advise a client as to appealing or reclaiming against an adverse judgment. There can be little doubt that a law agent is not liable in damages for erroneous but *bona fide* advice on this point;^(h) but the only safe course is to take, and to submit to the client's consideration, the opinion of counsel.⁽ⁱ⁾ It should be borne in mind that a mandate to carry on proceedings in an inferior court does not warrant an appeal to the Court of Session, and that special authority must be obtained for an appeal to the House of Lords.^(k)

27. When a country agent employs an Edinburgh agent to conduct a cause in the supreme courts, he is not bound to watch over its progress there; but it is his duty to communicate with his employer, in order to obtain from him the information necessary for the due conduct of the cause; to forward such information, when received, to the Edinburgh agent; and to answer the letters of the Edinburgh agent.^(l) He ought, moreover, to acquaint his client with the rule which prevents a successful party recovering from his opponent charges occasioned by double agency,^(m) and to refrain from superfluous communications, which serve only to augment the expense.⁽ⁿ⁾

28. Although law agents are privileged in regard to injurious or calumnious statements made by them in the course of their employment, no respectable practitioner will ever allow his zeal for his clients to induce him to make such statements, unless he is compelled to do so in order to protect the interests of a client, and upon his client's express instructions.^(o) It amounts to contempt of court

(h) *Ante*, p. 325, note (g).

(i) *Ante*, p. 323.

(k) *Ante*, pp. 105-6.

(l) *Short v. Lascelles*, 16 May 1828, 6 S. 810; *Barles v. Strathern and Douglas*, 17 Feb. 1860, 22 D. 851; *ante*, p. 328.

(m) *Ante*, pp. 172-3.

(n) See *Urquhart v. Grigor*, 12 June 1857, 19 D. 853.

(o) *Ante*, pp. 310-316.

for a law agent to publish letters tending to influence the result of an action. (*p*)

Duties in conveyancing.

29. A law agent ought not to allow a client to sign a deed without understanding its nature and effect. (*q*) Unless his employer has taken the matter into his own hands, an agent who has been employed to draw or prepare a deed should see that it is properly executed, (*r*) and as clients cannot be expected to understand technicalities of conveyancing, &c., it is also his duty to take all other steps necessary to make the deed effectual. (*s*) He is also bound to see that the deed is duly stamped, (*t*) and the full price or consideration set forth. (*u*) It need scarcely be said that, after a draft has been finally revised by the agent of one party, the agent of the other is not entitled, in extending it, to make any additions or alterations. (*x*) The various obligations arising from the employment of law agents in the preparation of particular deeds have been already fully considered. (*y*)

Duty of agent borrowing writs.

30. When one agent borrows title-deeds or other writs from another, on the usual undertaking to return them on demand, he is not entitled to retain them on any pretext whatever, (*z*) or to make use of them in such a way as to defeat the hypothec of the agent who has lent them. (*a*)

Concluding remarks.

31. The foregoing is necessarily a very brief and imper-

(*p*) *Daw v. Eley*, 15 Dec. 1868, 7 Law Reports, Equity, 49; *ante*, pp. 316 and 355.

(*q*) *Gillespie v. Gillespie*, 11 Feb. 1817, 19 F.C. 280; *Ker v. Wauchope*, 17 Feb. 1812, 5 Pat. App. 547; and *ante*, p. 332. As to taking instructions for the preparation of a will, see M'Laren on Wills and Succession, vol. ii. p. 578.

(*r*) *Ante*, p. 330.

(*s*) *Ante*, pp. 330-1.

(*t*) *Morison v. Ure*, 2 June 1826, 4 S. 656 (N. E. 662).

(*u*) 48 Geo. III. c. 149, §§ 22-26; 55 Geo. III. c. 184, § 8. If the under statement of the consideration affects the amount of the *ad valorem* duty, the agent who has knowingly stated a false consideration is liable to forfeit £500, and to be disabled from practising and holding a public office.

(*x*) *Wallace v. Fisher & Watt*, 4 Nov. 1870, 9 Macph. 75.

(*y*) *Ante*, pp. 331-5.

(*z*) *Herbert v. Rutherglen*, 23 June 1858, 20 D. 1164.

(*a*) *Ante*, p. 217.

fect sketch of the duties of law agents ; and only by actual practice, combined with a thorough knowledge of legal principles, and an intimate acquaintance with the text-books on court practice and conveyancing, can any one learn the multifarious duties of the profession. It would be both needless and impertinent to enlarge on the moral obligations of law agents. Happily, our reports disclose very few instances of misconduct or malversation. The high qualifications required for admission into the principal Societies of Law Agents, have secured a body of legal practitioners, among whom it would be difficult to find the prototypes of "Quirk, Gammon, & Snap," or of "Dodson & Fogg." A "Glossin" may still perhaps be found, but the Fairfords and the Pleydells are the true types of Scottish lawyers. In no profession is a man's character sooner or better known than in the law ; and the process of striking his name off the Rolls will probably be found an efficacious means of getting rid of any unworthy member.

CHAPTER XXV.

THE LAW RELATING TO AGENTS, CLERKS, &c.,
INTER SE.

Appren-
tices, their
duties and
obligations.

1. We have already fully considered the form of indenture or articles of clerkship, and the nature of the service required to qualify an apprentice for admission as a law agent. (a) On entering into indentures, apprentices generally pay a premium to their masters; but, apparently, the amount does not require to be stated in the case of an indenture with a law agent, as the stamp-duty is the same, whether any or no premium be paid. (b) When a premium has been paid, it is usual to allow an apprentice remuneration for his services, either in the form of a small salary, increasing annually, or in proportion to the amount of work that he may do in copying or drafting papers, &c. The obligations of apprentices to law agents are generally inserted in their indentures; but they do not differ from those of other apprentices to their masters. An apprentice is thus bound to enter into his master's service, and to continue in it during the whole period stated in his indenture, to be diligent and attentive to business, and respectful and obedient to his master; and he may be dismissed, if, in spite of warning and reproof, he is guilty of continued misconduct, or of repeatedly absenting himself from service without

(a) *Ante*, pp. 25-40.

(b) *Ante*, p. 29. The sections of the Stamp Act requiring the premium paid by an apprentice to be stated under pain of nullity of the indenture, specially except articles of clerkship to attorneys, &c., specifically charged with duty; 33 and 34 Vict. c. 17, §§ 39 and 40.

leave or necessary cause. (c) He is farther bound not to divulge the secrets of his master or of the latter's clients. It is, however, only in the professional business of his master that an apprentice to a law agent is bound to serve him; and in his intercourse with his apprentices no gentleman will ever forget that the relation between them is neither that of master and servant, nor that of master and industrial apprentice. (d)

2. It is the duty of the master to see that the indenture is properly executed and stamped, recorded in the register of probative writs, and intimated to the registrar of law agents. (e) He must, of course, properly employ and instruct his apprentices in his professional business; but he is not bound to delegate to them work requiring considerable professional skill; and the duty of instructing them is one which cannot be rigorously exacted, provided he allows them the usual opportunities of acquiring a knowledge of law and practice. (g)

Duties of agents to their apprentices.

3. As the contract of indenture is peculiarly personal, the death of the master puts an end to it, and the apprentice is not bound, without his own consent, to serve with the agent's representatives or successors in the good-will of the business; and similarly, in the event of the master retiring from business, the consent of the apprentice is required to a transfer of his indenture. (h) But where an apprentice is bound to a company, the death or retirement of any of the partners, or the assumption of new partners, does not appear to put an end to the contract, as long as one of the original partners still remains. (i)

How contract of indenture terminat

4. If the contract is dissolved by the death of the ap- Return of premium.

(c) Fraser on Master and Servant, p. 451 *et seq.*

(d) See doubts expressed by Lord Gillies, in *Bookless v. Normand*, 20 Nov. 1832, 5 Jur. 87, and by Lord Jeffrey in *Frame & Co. v. Campbell*, 9 June 1836, 14 S. 914, as to the competency of proceeding against a law apprentice by summary application to the sheriff, in order to compel him to continue in his master's service, when he is willing to pay the penalty stated in his indenture for failure to implement the obligations thereby undertaken.

(e) *Ante*, p. 30.

(g) See Fraser on Master and Servant, p. 457 *et seq.*

(h) Fraser on Master and Servant, pp. 467 and 470.

(i) *Id.* pp. 239 and 469.

prentice, the master is entitled to retain the whole premium or apprentice fee; but, on the other hand, if it is dissolved by the death of the master, his executors must refund a proportion of the fee; the amount of which, however, will not necessarily correspond with the unexpired apprenticeship, as the services of an apprentice generally become more valuable towards their close.^(k) When the master retires from business, the matter is usually arranged by his assigning the indenture, with the apprentice's consent, to another qualified master, who receives such proportion of the premium as may be agreed upon between them.^(l)

(k) *Id.* p. 467; Bell's Lectures on Conveyancing, p. 347.

(l) In England, when articles of clerkship are put an end to before their natural termination, "the Court, in cases where the clerk or his parents are in justice entitled to a return of part of the premium given with him, will in general interfere summarily, and refer it to the Master" (*i.e.*, an officer or clerk of court) "to say what portion of the premium given should be refunded. This has been done where the business of an attorney so much decreased during the clerkship that there remained little or nothing for the clerk to do, and consequently he could not gain the necessary instruction in his profession (2 Barnard, 227; and see *Id.* 331); so, where the attorney died before the expiration of the service (*Ex p. Bayley*, 9 B. & C. 691; *Hirst v. Tolson*, 18 L. J. Ch. 308); and even where the master refused to take back the clerk on account of misconduct (*Ex p. Prankerd*, 3 B. & Ald. 257; *Ex p. Fisher*, 1 Chit. Rep. 694. In this case the premium was £400, the time of service was a year and a-half, and the sum ordered to be refunded £196. See *Mercer v. Whall*, 5 Q. B. 447, where an attorney pleaded a plea justifying the dismissal of his artickled clerk for misconduct. And see *Phillips v. Clift*, 4 H. & N. 168). And where a party was artickled as a clerk to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been artickled died, the Court ordered the surviving partner to refund a portion of the premium, although, at the time of payment of such premium, his partner was indebted to him, and the premium had been set off in account between them (*Ex p. Bayley*, 9 B. & C. 691. The premium was £200; the sum refunded £180. See *Ex p. Haden*, 2 Jur. 873). But where the attorney absconded, and made an assignment of his property to J. S., the Court refused to order J. S. to refund any part of the premium (*Ex p. Prideaux*, 3 M. & Cr. 327, reversing the decision in 2 Deac. 158, 3 M. & A. 67). . . . The Court refused to order an attorney to repay any portion of a premium of two hundred guineas received by him with an artickled clerk who died within a month after he was artickled (*Re*

5. There is no reported decision in regard to the period Clerks. Period of their engagement. for which clerks to law agents are presumed to be hired; but according to the general understanding and practice, the hiring is only during pleasure.^(m) A clerk engaged at a salary of so much per annum will probably be held entitled to a reasonable notice of dismissal, such as will afford him a fair opportunity of getting another situation.⁽ⁿ⁾ In a recent case, where an agreement had been entered into between a firm of accountants and their clerk, whereby the clerk was engaged for five years at a salary of £300 per annum and a per-centage on the profits, the firm was dissolved by the death of one of the partners, and the surviving partner declined to continue the clerk's services. The clerk having raised an action concluding for implement or damages, it was held that the contract, being one of personal service to the company, was terminated by its dissolution; that the dissolution of the company by the death of a partner was not a breach of contract, and that the pursuer was therefore not entitled to damages; but that, as the contract contemplated annual and indivisible payments of salary, the pursuer was entitled to his salary for the year current at the dissolution of the contract, under deduction of his earnings during the unexpired portion thereof. Lord Deas, however, dissented from this judgment, on the ground that it was a jury question whether the pursuer was entitled to any or to what compensation, and that this could not be determined without a proof of the whole circumstances of the case.^(o)

6. Clerks who are not engaged at a fixed salary are Remuneration of clerks. generally paid according to their writings. The practice is not uniform; but they are usually allowed one-half of the charges authorised by the tables of fees for copying papers

Thompson, 1 Ex. 864. See *Craven v. Stubbings*, 34 L. J. Ch. 126, 10 Jur. N. S. 1189; where the clerk was a ward in chancery and wanted to change his profession.)—*Chitty's Archbold's Practice*, 12th ed. p. 41. See also *Pulling's Law of Attorneys*, 5th ed. p. 454.

^(m) *Fraser on Master and Servant*, p. 34. See also *Bell's Prin.* § 153.

⁽ⁿ⁾ See *Campbell v. Fyfe*, 5 June 1851, 13 D. 1041; and *Cameron v. Fletcher*, 9 Jan. 1872, 10 Macph. 301.

^(o) *Hoey v. M'Ewan & Auld*, 4 June 1867, 5 Macph. 814.

and engrossing deeds; and monthly settlements are the rule. In one case a Solicitor in the Supreme Courts offered to a young man from the country a salary of £30 or £35 per annum, which was declined, but the clerk entered into the solicitor's service without any special agreement as to the rate of remuneration, and was paid for several years according to his writings, under deduction of sums varying from a-half to less than a-fourth of the usual fees. Only payments to account having been made to him during three years thereafter, the clerk raised an action for a certain sum as the amount due for his writings at the full rate. But it was held that the previous course of dealing must regulate the settlement between the parties, and that it was to be presumed not to have been intended that he should ever receive payment at the full rate, though the rate of deduction must diminish in proportion as his experience increased; and the amount was determined by a remit to the preses of the Society of Solicitors.(p) Remuneration for extra services may sometimes be due to a clerk; but in order to support an action for such remuneration, the pursuer must make a specific averment of the services he was originally engaged to perform, of the extra services performed by him, and of the agreement to allow him additional remuneration for such extra services.(q) A clerk has no preference for his salary or wages over the other creditors of his employer.(r) A law agent ought to take regular receipts for all payments to his clerks and apprentices, and not rest satisfied with entering such payments in his books.(s)

Clerk's
claim for
remunera-
tion barred
by his mis-
conduct.

7. It is a relevant defence to an action by a clerk for payment of his salary that he has been guilty of misconduct or negligence.(t) But such a defence will be repelled where

(p) *Stewart v. Clyne*, 2 Feb. 1831, 9 S. 382, 15 June 1833, 11 S. 727, affirmed with a variation, 17 June 1835, 2 S. & M'L. 45.

(q) *Latham v. Edinburgh & Glasgow Rail. Co.*, 18 July 1866, 4 Macph. 1084.

(r) *Fraser on Master and Servant*, p. 124.

(s) *Irvine v. Lang*, 6 March 1840, 2 D. 804.

(t) *Sinclair v. Erskine*, 22 Feb. 1831, 9 S. 487.

the defender has engaged the clerk after having had experience of his qualifications, and does not aver that he ever made any complaint while the clerk was in his service.(u)

8. A law agent is of course responsible for his clerks and apprentices within the scope of their authority, express or implied. Payment to a clerk duly authorised and accredited is equivalent to payment to his master.(v) But a law agent's clerk does not seem to have any implied authority to enter into arrangements binding on his master's clients,(w) nor, on the other hand, to be accountable to such clients for money received by him as sub-agent for his master.(x) The clerks and apprentices of law agents are entitled to borrow processes on behalf of their masters;(y) and it is usual to include their names in process-captions granted in the Court of Session and in some of the sheriff-courts.(z)

Authority
of clerks.

9. Communications made to a law agent's clerk, in the course of his employment in his master's service, seem entitled to the same privilege as those made to the master himself;(a) and clerks as well as apprentices are bound to keep the secrets both of their masters and of their masters' clients.(b) But it has been held in England that a clerk commencing to practise on his own account cannot be restrained from acting for parties against whom his master was employed, upon a general allegation that he has acquired in his former service information likely to be prejudicial to the clients of his master.(c) A solicitor's clerk, consulted confidentially by one of his employer's clients, has been held to stand in the same fiduciary position as his employer in re-

Disabilities
of clerks.

(u) *Fraser v. Lang*, 10 Feb. 1831, 9 S. 418.

(v) *E. of Galloway v. Grant*, 5 Dec. 1857, 20 D. 230; *Hemming v. Hale*, 9 Nov. 1859, 7 Scott, Common Bench, 487.

(w) *Hodson v. Drewry*, 1839, 9 Dowling, 569; *Duffy v. Hanson*, 27 April 1867, 16 Law Times, N. S., 332.

(x) *Stephens v. Badcock*, 31 Jan. 1832, 3 Barnewall & Adolphus, 354.

(y) A. S., 21 Dec. 1833.

(z) *Shand's Practice*, p. 512; *Dove Wilson's Sheriff-Court Practice*, p. 192; *M'Glashan's Sheriff-Court Practice*, 4th ed., pp. 85 and 317.

(a) *Ante*, p. 263; *Taylor on Evidence*, 6th ed., p. 821.

(b) *Kerr v. D. of Roxburgh*, 18 July 1822, 3 Mur. 141.

(c) *Bircheno v. Thorp*, 5 Sept. 1821, 1 Jacob, 300.

gard to the purchase of that client's property.(d) Unless expressly stipulated for by his master, there is, however, no restriction on a duly qualified clerk practising on his own account;(e) but, during the period of his service, he ought not to act against his master's clients. An apprentice, on the other hand, must not carry on business on his own account before the expiration of his service under indenture.(g)

Law agents
may enter
into part-
nership.

10. Law agents may, of course, enter into partnerships; and the rights and liabilities thence arising do not in general differ from those implied in mercantile and other partnerships. There are, however, some peculiarities in the case of legal partnerships that require to be considered.

Qualifica-
tion of part-
ners.

11. In England it is necessary that every member of a legal firm should be duly qualified to act, by admission, enrolment, and certificate to practise.(h) In Scotland the name of a person who has not got either an attorney's or a notary's certificate, cannot be used alone or along with that of any other person in any proceeding in any court;(i) and it seems doubtful whether a firm one member of which is uncertificated, can sue for payment of an account incurred to the firm.(k) Moreover, an agent who authorises or permits his name to be used by an unqualified practitioner in judicial proceedings is guilty of contempt of court, and may be suspended for a year.(l) But, subject to these restrictions, there is nothing to prevent a law agent from entering into partnership or dividing the profits of litigation with a certificated notary, or apparently even with an unqualified person.(m) In any case, it is quite lawful and customary to remunerate

(d) *Hobday v. Peters*, 24 May 1860, 29 Law Journal, Chancery, 780.

(e) See *Pinley v. Bagnall*, 21 Nov. 1782, 3 Douglass, 155.

(g) *Ante*, p. 34.

(h) Pulling's Law of Attorneys, 5th ed., p. 440; and *ante*, p. 60, note (g).

(i) *Ante*, pp. 54 and 60.

(k) *Barry v. Singer*, 8 July 1826, 4 S. 813 (N. E. 820).

(l) A.S. 21 Dec. 1833. See also *ante*, pp. 61 and 355. As to an agent, who is not authorised to act for the poor, carrying on litigation in the name of a poor's agent, see *Barr v. Clyne*, 1 March 1832, 10 S. 408.

(m) Paterson's Compendium of English and Scotch Law, p. 429.

a managing clerk by a share of the profits of a professional business, and arrangements may be lawfully made for settling a share of such profits on the widow or children of a deceased partner;(n) and such contracts do not of themselves render them responsible as partners therein, nor give them the rights of partners.(o)

12. The contract of copartnery should specify the amount of each partner's share of the profits. In the absence of writing, there is a presumption in favour of equality.(p) Thus, it has been held in England that where two solicitors, who are not in partnership, are employed in the same matter for a client, as in the defence of an action, the *prima facie* inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each.(q) This presumption in favour of an equal division of profits may, of course, be rebutted by evidence to the contrary;(r) and where the proportions of the shares of the partners, and the charges to be deducted from the general proceeds before division, have been ascertained by the balances of the books for a certain period, and there is no evidence of any alteration in this arrangement, the same rule will be held to regulate their rights during the subsequent period when no balances have been struck.(s)

Shares of partners in the profits.

13. When a member of a legal firm holds any office which disqualifies him from practising in Court, he ought to make a distinct arrangement not to share in the profits of his partners in judicial proceedings.(t) A judicial factor who requires the services of a law agent, must not employ any one connected with him as a partner.(u) As has already been

Disability of one partner affecting the other.

(n) *Candler v. Candler*, 22 June 1821, 6 Maddock, 141; *Sterry v. Clifton*, 21 Feb. 1850, 19 Law Journal, Common Pleas, 237.

(o) 28 and 29 Vict. c. 86, §§ 2 and 3.

(p) Clark on Partnership, pp. 137 and 371.

(q) *Robinson v. Anderson*, 14 Feb. 1855, 20 Beavan, 98.

(r) Clark on Partnership, *supra*.

(s) *Blair v. Russell*, 22 May 1828, 6 S. 836.

(t) See *Regina v. Fox*, 28 Law Journal, Magistrates Cases, 54.

(u) A.S. 11 March 1861, § 25. See also *M'Farlane v. Donaldson*, 12 May 1835, 13 S. 724.

pointed out, the rule prohibiting a law agent who is also a trustee from making professional charges against the trust-estate, applies to the case of his employing a firm of which he is a partner, even where the business has been done by another partner.(x)

Retainer of
firm by em-
ployment of
one partner.

14. Although it is usual for each partner to have his own clients, and separately to transact their business, the retainer is deemed to be given by the clients to the firm, and not merely to one partner.(y) But where the proprietors of an estate appointed as their factor a law agent who was in partnership with another, it was held, on the bankruptcy of the co-partnership, that although the factory transactions and accounts were entered in their books, yet, as it did not appear that the proprietors had recognised the firm as their factors, the trustee on the sequestrated estate of the company was not entitled to claim a debt alleged to be due to the firm as factors for the proprietors.(z) As to the various effects of the retirement of a partner, or the assumption of a new member, reference may be made to previous chapters of this treatise.(a)

Liability of
firm for acts
of each
partner.

15. In partnerships between law agents the general rule applies, that each partner is liable for the acts and representations of his co-partners *within the scope of the partnership business*; and the limit of the liability thus depends on the precise nature of the partnership business.(b) There are very few Scotch cases on this subject; but the English decisions may be regarded as authoritative in Scotland in point of principle, though it must be borne in mind that the ordinary business of English attorneys and solicitors is not quite the same as that of Scotch law agents, especially as regards matters of conveyancing.

(x) *Ante*, p. 280.

(y) *Cook v. Rhodes*, 14 Jan. 1815, 19 Vesey, 273, *note*; *Edgar v. Barnes*, 10 Nov. 1862, 31 Beavan, 579.

(z) *Mabon (Bell's Tr.) v. Christie*, 8 Feb. 1844, 6 D. 619.

(a) *Ante*, pp. 207 and 227, as to hypothec; p. 235, as to prescription of accounts; and p. 379, as to rights of clerks and apprentices on a dissolution.

(b) *Pulling's Law of Attorneys*, 5th ed. p. 441; *Chitty's Archbold's Practice*, 12th ed. p. 101.

16. As regards the liability of a firm for the undertakings of a partner, it is part of the ordinary business of law agents to engage printers to print law papers, and all the partners of a company are therefore liable in payment of accounts incurred in printing papers in processes entered in the books of the company, although under the agency of one partner alone. (c) It has been held in England that the implied authority of one partner to bind a company by promissory notes or bills signed by him in name of the firm exists only in partnerships of trade; and consequently, that an attorney or solicitor has no implied authority to bind his partners by a note or bill in name of the firm, even though it should be given for their debt. (d) And, similarly, where one of two attorneys in partnership signed in the name of the firm an undertaking to pay the debt and costs in an action, in consideration of the defendant, their client, being discharged out of custody, the firm was held not bound by this undertaking, as it was not a transaction in the usual course of the business of attorneys. (e) But it does not follow that a guarantee by one partner is in no circumstances binding on another. "It would be sufficient to prove a parole acknowledgment from the other partner, subsequently to the guarantee, that it was properly given; or to show a previous course of dealing in which similar guarantees had been given in the name of the firm, with the privity of both partners, or that the guarantee was given in the course of, and was incidental to, a transaction falling within the ordinary course of business of the firm; and that it was notified to the other partner, who expressed no dissent." (g)

Liability for undertakings by one partner.

17. It is quite settled that all the partners of a legal firm are liable to their clients for the negligence or want of

Liability of firm to clients for negligence and misconduct of one partner.

(c) *Neill & Co. v. Hopkirk*, 31 Jan. 1850, 12 D. 618.

(d) *Hedley v. Bainbridge*, 25 June 1842, 11 Law Journal, Queen's Bench, 293.

(e) *Hasleham v. Young*, 5 April 1844, 5 Adolphus & Ellis, Queen's Bench, 833.

(g) Chitty on Contracts, 9th ed., p. 232.

professional skill of any one of their number. (h) The English cases show that a firm will also be held responsible for the misappropriation or embezzlement by one of the partners of money received in the ordinary discharge of professional duties; (i) for example, money recovered under a joint and several power of attorney, as a client's share of a fund in court, (k) or a sum sent by a client in payment of a bill of costs due to the firm, (l) or to make arrangements with the client's creditors. (m) Similarly, where a partner receives money from a client for the express purpose of a special investment, the other partners are liable in the event of his misapplying it, (n) at least where he has falsely represented it to have been invested, such representation being regarded as a guarantee by the firm, (o) or where the money has been paid into the firm's bank account. (p) But as it is the duty of scriveners, and not necessarily or generally part of the duty of English attorneys or solicitors, to receive deposits of money for the general purpose of investment when a good security can be got, such receipt of money by one partner will not bind the others to account for it, without proof that they authorised or assented to the transaction. (q)

Liability of
firm to third
parties for
the wrong-
ful act of
one partner.

18. For the wrongful acts of a partner, a company may even be held liable to third parties, provided such acts have been committed within the limits of his implied agency. A firm has thus been held liable for money belonging to third parties, received by a partner in

(h) *Slater v. Henderson & Scott*, 17 Jan. 1822, 1 S. 241 (N. E. 229); *Graham v. Hunter's Trs.*, 4 March 1831, 9 S. 543.

(i) *Clark on Partnership*, p. 254.

(k) *St Aubyn v. Smart*, 15 Dec. 1867, 5 Law Reports, Equity, 183; affirmed 24 June 1868, 3 Law Reports, Chancery Appeals, 646.

(l) *Moore v. Smith*, Aug. 1851, 14 Beavan, 393. See also *Anderson v. Rutherford*, 19 Feb. 1835, 13 S. 488.

(m) *Atkinson v. Mackreth*, 27 June 1866, 2 Law Reports, Equity, 570.

(n) *Clark on Partnership*, p. 254; *Willet v. Chambers*, 23 May 1778, 2 Cowper, 814, 3 Ross's Leading Cases, 476.

(o) *Blair v. Bromley*, 3 July 1847, 2 Phillip, 354.

(p) *Edgar v. Barnes*, 10 Nov. 1862, 31 Beavan, 579.

(q) *Sims v. Brutton*, 18 Nov. 1850, 20 Law Journal, Exchequer, 41; *Harman v. Johnson*, 29 April 1853, 2 Ellis & Blackburn, 61; *Bourdillon v. Roche*, 27 May 1858, 27 Law Journal, Chancery, 681.

the ordinary course of the business of the firm;(r) as well as for a partner carrying on an action without authority,(s) or making fraudulent representations, such as misrepresenting the nature of security to be given by a client in a loan transaction.(t) In endeavouring to attach such liability to a firm, it is always a very material circumstance that the money has been paid into the bank account of the co-partnery, and wherever funds have been applied to the purposes of a firm by the fraud of one of its partners, they may be recovered by the owner identifying them in the custody of the firm.(u) But it has been held in England that an attorney cannot by his own single act subject his co-partners to the summary jurisdiction of the court.(x)

19. The general rule of law is applicable to a professional partnership, that, "when the partnership is dissolved, any one or more of the partners may, in the absence of a voluntary agreement to the contrary, carry on the business on their own account; and they are quite entitled to make use of all the advantages incidental to their former connection with the partnership. It has even been held that in the case of dissolution by death, the survivor may make use of the name of the late firm. . . It seems settled law that when the good-will of a business has been sold the seller may recommence a similar business in the immediate neighbourhood of the old premises, the only restrictions on this right being that in the case of a firm the sellers shall not assume the old name or represent themselves as the successors of the former concern."(y) The term "good-will,"(z) it has been observed, is inapplicable to the

Goodwill of
partnership

(r) Clark on Partnership, p. 254; *Bridges v. Branfill*, 16 April 1841, 12 Simon, 369. See also *Sadler v. Lee*, 8 May 1843, 6 Beavan, 324.

(s) *In re Manby*, 19 Dec. 1856, 26 Law Journal, Chancery, 313.

(t) *Brown v. Cuthill*, 28 March 1828, 4 Mur. 474; *Sawyer v. Goodwin*, 11 June 1867, 36 Law Journal, Chancery, 578. See also *M'Farlane v. Donaldson*, 12 May 1835, 13 S. 724.

(u) Clark on Partnership, p. 255.

(x) *In re Lawrence*, 2 Aug. 1854, 23 Law Journal, Chancery, 791.

(y) Clark on Partnership, p. 431.

(z) "It is very difficult to give any intelligible meaning to the term

business of a professional man; and the general rule, that when a company is dissolved the good-will must, in the absence of any special agreement, be sold for behoof of all concerned, does not apply to a legal firm, as a professional man cannot be forced into an agreement not to prosecute his business within a certain area.(a) But it is quite competent for a practising agent voluntarily to agree to relinquish business and recommend his clients to another agent,(b) or for a retiring partner to bind himself to allow the remaining partners to carry on the business in his name.(c) But the English courts have always shown great reluctance to enforce agreements restraining persons from exercising their professional employment, as not only being to some extent restrictions on trade, but also as depriving third parties of the services of those in whom alone they may have confidence;(d) and the general principle deducible from

'good-will,' as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in any particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'good-will' is something distinct from the profits of a business, although in determining its value the profits are necessarily taken into account; and it is usually estimated upon so many years' purchase upon the amount of these profits. But the term 'good-will' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. I can perfectly understand a solicitor agreeing to relinquish his business in favour of another, and to use his best endeavours to recommend his clients, and engaging not to interfere with his successor, by a stipulation not to carry on business within a certain distance; but to sell the good-will without anything more, and without arranging any price, would be an agreement incapable of being enforced by specific performance."—*Per* Lord Chancellor Chelmsford, in *Austen v. Boyes*, 23 June 1858, 2 De Gex & Jones, 626.

(a) Clark on Partnership, p. 431; *Farr v. Pearce*, 10 Feb. 1818, 3 Maddock 74; and *Spicer v. James*, Rolls, M.T., 1830.

(b) *Bunn v. Guy*, 7 Nov. 1803, 4 East, 190.

(c) *Thornbury v. Beville*, 2 May 1842, 1 Young & Collyer's Chancery Cases, 554.

(d) See *Bozen v. Farlow*, 29 July 1816, 1 Merivale, 459; *Candler v.*

the decisions on the subject is, that such an agreement will not be held as binding, unless it has been entered into for a reasonable consideration, and within reasonable limits of time or distance.(e) It is not very easy to say what is a reasonable restriction; but in the various cases the courts have sustained stipulations not to practise for two years within 150 miles from London,(e) for seven years within 50 miles of Westminster,(f) and even for 20 years within Great Britain.(g) The correctness of the last of these decisions has, however, been questioned;(i) and more recently, where articles of partnership between London solicitors provided that, in the event of any of them retiring he should be paid the marketable value of his share of the good-will, and should not practise within 100 miles of the General Post Office, it was held that the good-will must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till its termination by the expiration of the period fixed on for its endurance.(k) It may be here mentioned that an articulated clerk has been held bound by an undertaking in his indenture that at the expiry of his services he would not either, directly or indirectly, interfere or be concerned as an attorney with any of his master's clients.(l)

20. As our law formerly stood, it was illegal for a law agent to enter into any agreement or arrangement by which he might participate with another agent in the profits of litigation in a court in which he himself was not entitled to practise.(m) But it is now declared by the Law Agents

Division of
profits be-
tween town
and country
agents now
lawful.

Candler, 15 Aug. 1831, Jacob, 231; *Nicholls v. Stretton*, 5 Dec. 1843, 7 Beavan, 42; and *Swallow v. Wallingford*, 25 March 1848, 12 English Jurist, 403.

(e) *Mitchell v. Reynolds*, 1711, 1 Smith's Leading Cases, 6th ed., 356, where all the cases will be found collected, and their import considered.

(f) *Bunn v. Guy*, *supra* (b).

(g) *Galsworthy v. Strutt*, 14 Jan. 1848, 1 Welsby Hurlstone & Gordon, 659.

(h) *Whittaker v. Howe*, 18 Jan. 1831, 3 Beavan, 383.

(i) 1 Smith's Leading Cases, 6th ed., pp. 369 and 374.

(k) *Austen v. Boyes*, 23 June 1858, 2 De Gex & Jones, 626.

(l) *Nicholls v. Stretton*, 5 Dec. 1843, 7 Beavan, 42.

(m) *Brash v. McKinnon*, 9 March 1820, 20 F.C. 127; A. B., 12 May 1832, 10 S. 523, affirmed 12 July 1833, 6 W. & S. 489.

Act that "agreements between law agents acting for the same client to share fees or profits shall be lawful."⁽ⁿ⁾ This provision not being retrospective, such agreements, if entered into before the passing of the Act (5th August 1873) must be regarded as *pacta illicita*; and as "law agent" is declared to mean persons entitled to practise as agents in courts of law in Scotland,^(o) it will apparently not legalize a division of profits between a Scotch law agent and an English solicitor.^(p)

Agency
terms.

21. In regard to the division between town and country agents of the profits of litigation in the supreme courts, it may be mentioned that in England the ordinary arrangement is for country solicitors to receive one-half of the net profits made by their London agents, while the latter do not share in the profits of the country solicitors.^(r) But except in appeals from the sheriff-court, Edinburgh agents have much more work and responsibility than London agents in the management of litigation in the supreme courts; and the scale of charges in the Court of Session is too low to admit of an equal division of profits.

Is country
agent liable
for town
agent with
whom he
divides pro-
fits?

22. It may be right to caution country agents against employing whatever Edinburgh agent will allow them the largest share of his fees; for although under the former system a country agent was not responsible for the town agent whom he was obliged to employ, it may reasonably be doubted whether a country agent who enters into a sort of partnership with a town agent to divide the profits of litigation should not be held responsible for the misconduct or negligence of such town agent within the limits of his autho-

(n) 36 and 37 Vict., c. 63, § 21.

(o) "The following words and expressions when used in this Act shall have the meanings hereby attached to them; that is to say, 'Law Agents' shall include Writers to the Signet, Solicitors in the Supreme Courts, Procurators in any Sheriff Court, and every person entitled to practise as an agent in a court of law in Scotland."—36 and 37 Vict., c. 63, § 1.

(p) *Gordon v. Dalziel*, 13 Jan. 1852, 15 Beavan, 351, and 21 Law Journal, Chancery, 206. See also § 18,112 of Evidence taken by the Law Courts Commission.

(r) § 12,213 of Evidence taken by the Law Courts Commission.

city, more especially as by the law of England this responsibility is incurred by a country solicitor who employs a London agent.(s)

23. When a country agent has a personal cause of his own in the Court of Session, it is quite common for his Edinburgh agent to agree to conduct it on the understanding that he is to be paid only his actual outlays unless he succeeds in recovering his professional charges from the opposite party. Such an agreement is quite lawful; but in order to obviate any difficulty in regard to the mode of proving it, the country agent ought to obtain from the Edinburgh agent a letter or other writing containing a distinct statement of the footing on which he undertakes the employment.(t)

Agreements between town and country agents as to personal causes.

24. As has been already stated, a law agent authorised and acting for a client whom he discloses does not now incur any liability to another law agent, except such as he expressly undertakes in writing; but in the absence of any express agreement, a Scotch agent seems still liable to any English attorney or solicitor that he may employ on behalf of a client.(u)

Liability of one agent employing another.

25. An agreement between a law agent and a messenger-at-arms, by which the latter undertakes to act in the employment of the agent for a fixed yearly salary, while the agent is to draw the fees and emoluments, is a *pactum illicitum*, for the breach of which an action will not be allowed.(x) A similar agreement with a notary-public seems equally objectionable, as both messengers and notaries are public officers who are bound to serve all the lieges.(y)

Division of fees with a messenger or notary.

(s) See *ante*, p. 339.

(t) *Ante*, pp. 90 and 124.

(u) *Ante*, p. 148.

(x) *Henderson v. Mackay*, 20 Dec. 1832, 11 S. 225.

(y) *Murray v. Taylor*, 15 May 1828, 6 S. 802. As to pleading the illegality of such agreements, see *ante*, p. 126.

CHAPTER XXVI.

SOCIETIES OF LAW AGENTS.

How af-
fected by
the Law
Agents
Act.

1. As has been already stated, the Law Agents Act renders it unnecessary for any law agent to become a member of any society or faculty of law agents, and allows any such society to admit any enrolled law agent to be a member on such terms as it may see fit, an apprenticeship to a member being declared no longer indispensable. (a) At present it is impossible to say to what extent the various Societies will relax their regulations in regard to the admission of applicants. But as the existing regulations are not likely to be maintained, a statement of them here would only prove misleading; (b) and any one who desires to become a member of any particular Society can easily ascertain from the secretary the terms of admission at the time of his application.

The following are the Societies formed prior to the Procurators Act of 1865, arranged according to the number of their members.

SOCIETY OF WRITERS TO THE SIGNET.

Are the
Writers to
the Signet
an incorpo-
ration?

2. Although the Writers to the Signet are the oldest body of law agents in Scotland, (c) it is uncertain whether they form

(a) *Ante*, pp. 23-24.

(b) The existing regulations of the Writers to the Signet, and the Solicitors Act of 1871, containing those of the Solicitors in the Supreme Courts, are printed in the Appendix.

(c) See short historical sketch of the Society, *ante*, p. 9, and as to the

an incorporation. They do not possess any charter of incorporation; but they have frequently exercised the powers of a corporate body. In one case in which they were sued as "the Keeper, Commissioners, and whole Society of Clerks to the Signet," the Court of Session found that, "though entitled to all the privileges of a corporation," they had "no power by their own authority to increase their legal or established fees;"(d) and this judgment was affirmed by the House of Lords.(e) In a subsequent case they sued as "the Keeper, Deputy-Keeper, and Society of Writers to His Majesty's Signet;" and no objection was taken to their title.(g) In a still later case, in which the Society sued a member who had violated the regulations of the society, the summons was raised in name of the keeper, deputy-keeper, and certain other persons, but not including all the members of the society, "all Clerks or Writers to the Signet, and Commissioners for the Society and Corporation of Clerks to the Signet; Richard Hotchkis, treasurer, and Richard Mackenzie, Writer to the Signet, procurator-fiscal to the said Society."(h) The Lord Ordinary repelled an objection stated to the title of the pursuers, and found them "in this respect entitled to all the privileges of an incorporation." To this interlocutor the Court unanimously adhered, the majority of the judges being of opinion that the two previous decisions had settled that the Society was entitled to all the privileges of a corporation, while the Lord President thought that, whether the Society was an incorporation or not, the defender was bound by the regulations which he had subscribed. On appeal to the House of Lords, this judgment was reversed, on the ground that the instance was defective, whether the Society was an incorporation or not.(i) Lord Gifford, by whom alone the

privileges which members possess in addition to those of enrolled law agents, see *ante*, p. 75 *et seq.*

(d) *Solicitors v. Clerks to the Signet*, 25 Feb. 1800, 12 F.C., 372; *M. voce* College of Justice, Appx. No. 1.

(e) 7 April 1802, 4 Pat. 326.

(g) *Writers to the Signet v. Gairdner*, 21 June 1814, 17 F.C. 656.

(h) *Writers to the Signet v. Graham*, 13 Feb. 1823, 2 S. 214 (N. E. 190.)

(i) 21 June 1825, 1 W. & S. 538.

The real property belonging to the Faculty is of very considerable value.

Annual
examination
of clerks and
apprentices.

It may be right to mention that for many years past the Faculty have held an annual periodical examination of clerks and apprentices, which has done much good in encouraging study. The competitors have been divided into four classes, according to the number of years that they have served as clerks or apprentices; and a prize has been given in each of these classes to the competitor who obtained the highest number of marks, while certificates according to the degrees of merit have been granted to the other competitors. As this examination may perhaps be continued, the subjects of the last examination are printed, as a specimen, in the Appendix to this treatise.

THE SOCIETY OF ADVOCATES IN ABERDEEN.

Incor-
porated.

5. This Society has been incorporated since 1774.^(h) On 13th May 1862, a royal charter was obtained, of new incorporating the Society under the name and title of "The Society of Advocates in Aberdeen," corroborating the prior charters, and enlarging the powers and privileges thereby conferred.

Office-
bearers.

The office-bearers of the Society consist of a President and a Treasurer, a Librarian, a Secretary and Factor or Cashier;⁽ⁱ⁾ and various committees are annually appointed to manage the Society's business.

Number of
members.

The number of the members of the Society is at present 131.

Meetings.

The annual general meeting of the Society is held upon the last Tuesday of November, when the office-bearers are elected. The President, or, in his absence or on his refusal, any five members, may call a special meeting *pro re nata*. Seven members are required to form a quorum at any meeting; and the President, whom failing the Treasurer, whom failing any other member to be appointed by the meeting,

(h) See brief historical sketch of the Society, *ante*, p. 14.

(i) Mr John Clark, 34 Marischal Street.

has the right of presiding, and has a casting as well as a deliberative vote.

The Society have erected a Hall, Library, and Committee Rooms for their meetings and for transacting their ordinary business, and the Library now contains a large and valuable collection of books. The Society have from time to time invested their funds in the purchase of lands, which are now of very considerable value. Their entire funds and property amount to about £73,000. Of this sum, about £48,000 belongs to a fund for the benefit of the widows of members, which was established in 1823. ^{Property and funds.}

SOCIETY OF PROCURATORS AND SOLICITORS FOR THE CITY
AND COUNTY OF PERTH.

6. This Society was instituted in 1825, and incorporated by royal charter in 1857. The number of members is at present 55. The office-bearers are a President, a Vice-President, a Secretary and Treasurer,^(k) and an honorary Librarian; and these, together with five other members, form a Committee of Management. The general meetings of the Society are held on the last Friday of March and the last Friday of October, the latter day being fixed for the election of the office-bearers. The main object of the Society has been the establishment of a law library, containing almost every work relating to the profession.

FACULTY OF PROCURATORS AND SOLICITORS IN DUNDEE.

7. This Society has been in existence since the end of last century, and was incorporated by royal charter in 1819. The number of members is at present 52. The office-bearers are a Preses, a Vice-Preses, a Treasurer, and a Secretary;^(l) and these, together with other three members, form a committee for the management of an excellent law library. Two stated general meetings are directed by the charter to be held in each year, viz., on the first Thursday of

^(k) Mr William Reid, Perth.

^(l) Mr J. A. Swanston, 31 Bank Street.

February, when the office-bearers are elected, and the first Thursday of August. The Preses, or, in case of his death or absence, the Vice-Preses, may summon a general meeting of the Society at any time, on twenty-four hours' notice, and in the event of their failing or refusing to do so when required by any three members, the requisitionists may themselves call such meeting.

FACULTY OF PROCURATORS IN PAISLEY.

8. This Society was incorporated by royal charter in 1803.^(m) There were then 14 members, while there are now 45. The office-bearers consist of a President or Dean of Faculty, a Council of Managers, consisting of three members, a Treasurer, a Fiscal, and a Clerk.⁽ⁿ⁾ The stated general meetings are held on the first Friday of June and the first Friday of November in each year. The Dean may summon a meeting at any time, on twenty-four hours' notice, and he is bound to do so upon a requisition signed by any five members; and in the event of his absence or failure, it is within the power of any seven members to call such meeting. When the Dean is present, he presides; and nine members form a quorum. The Faculty possess a Library, which is under the charge of a committee of five members, of whom the Treasurer must be one. There is also a fund in connection with the Faculty for the support of decayed members and the widows and children of deceased members. The annuity payable to each widow is at present £25; and in the event of a member dying without leaving a widow, an allowance is made to any child or children that he may leave under the age of fourteen. The funds of the Faculty, which at present amount to £10,046, must never be reduced below £3500.

SOCIETY OF SOLICITORS OF BANFFSHIRE.

9. This Society was incorporated by royal charter in 1840. There are at present 25 members. The office-bearers are a

^(m) See *ante*, p. 18.

⁽ⁿ⁾ Mr John Bartlemore, County Buildings.

President, a Secretary,^(o) and a Treasurer. The annual general meeting of the Society is held on the second Friday of December, when the office-bearers are elected. It is within the power of the President, whom failing of any seven members, to call special meetings at any time. The funds of the Society are appropriated to the support of decayed members, and of the widows, children, and other relations of deceased members. There is also a library in connection with the Society.

SOCIETY OF SOLICITORS BEFORE THE COMMISSARY, SHERIFF, AND
CITY COURTS OF EDINBURGH.

10. This Society was incorporated by royal charter in 1780.^(p) The members are generally called Solicitors-at-Law, and their number is at present 23. The office-bearers are a Preses, Vice-Preses, Treasurer, Fiscal, Clerk,^(q) and Auditor, besides various committees, &c. Two general meetings are held annually in terms of the charter, on the last Friday of March and the last Friday of August; and two other general meetings are held on the last Fridays of May and November. It is also within the power of the Preses, whom failing the Vice-Preses, and in case of their refusal or undue delay, then of any five members, to call a special meeting. Five members form a quorum at all meetings; and in the event of the absence of the Preses or Vice-Preses, the members present elect one of their own number to pre-side. The funds of the Society are appropriated to the purposes directed by the Society, and particularly to the support of decayed members and of the widows of members. The annuity payable to each widow is at present £30; and in the event of a member dying without leaving a widow, or on the death of a widow, an allowance is made to any child or children so left under the age of sixteen. The library of the Society is under the charge of five curators.

(o) Mr William Coutts, Banff.

(p) See short historical sketch of the society, *ante*, p. 17.

(q) Mr Geo. M. Wood, 53 George IV. Bridge.

SOCIETIES INCORPORATED UNDER THE PROCURATORS ACT.

11. There are twenty-three Societies of Law Agents incorporated under the provisions of the "Procurators (Scotland) Act, 1865." Their names have already been mentioned,^(r) and as their number renders impossible any detailed statement regarding them in this treatise, reference must be made to the Scottish Law List for information regarding their numbers, office-bearers, and general meetings. It may, however, be mentioned that most of them have got libraries, and several of them have established funds for the support of the widows of members. The Law Agents Act of 1873 repeals the Procurators Act from and after 1st February, but it expressly provides that "such repeal shall not prevent societies which, prior to the passing of this Act, were formed under the said Act from continuing to exist as incorporated societies, and electing such office-bearers as they please, and admitting members on such terms as they see fit; provided always that it shall not be necessary for any agent admitted under this Act to become a member of any such society."^(s)

UNINCORPORATED SOCIETIES.

12. There are at present three unincorporated Societies of Law Agents, viz., the Associated Procurators of Wigtonshire, the Society of Writers in Glasgow, and the Society of Writers in the county of Ayr. The Society of Writers in Glasgow,^(t) instituted in 1865, is composed of 66 members, all duly licensed legal practitioners, though many are not practitioners in any court.^(u) The leading object of the Society has been to give united expression to the opinions of members on legal and professional questions, and it has exercised considerable influence since its institution.

(r) *Ante*, p. 19, note (d).

(s) 36 and 37 Vict. c. 63, § 25.

(t) Secretary, Mr P. Y. Black, 137 West George Street.

(u) Most of these will probably be admitted as law agents, under sect. 25 of the Law Agents Act.

APPENDIX.



APPENDIX.

I.—ACTS OF PARLIAMENT.

28° & 29° VICTORIÆ REGINÆ.

CAP. LXXXV.

An Act to amend the Laws relating to Procurators in Scotland.—
[5th July 1865.]

WHEREAS the number of Procurators practising before the Inferior Courts in *Scotland* has of late years greatly increased, and the interests entrusted to the care of such procurators have risen in importance: And whereas it is desirable to improve the qualifications and standing of the members of that branch of the legal profession, and to regulate the mode of admitting them to practice, and to confer corporate powers on certain faculties and societies: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. The following words and expressions when used in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context inconsistent with or repugnant to such construction; that is to say, Interpre-
tation of
terms.

“Inferior Court” shall embrace Sheriff Courts, Commissary Courts, Burgh Courts, Admiralty Courts, Dean of Guild Courts, Justice of Peace Courts, and all other Courts of Law having only local jurisdiction in *Scotland*:

"Procurators" shall include all persons who have already been admitted as procurators in any Sheriff Court in *Scotland*, or as members of the Incorporated Society of Writers in *Dundee*, or who shall hereafter be admitted as Procurators under this Act:

"Sheriff" shall include Steward, but not Sheriff Substitute or Steward Substitute:

"Sheriff Clerk" shall mean Sheriff Clerk Depute as well as Sheriff Clerk, and shall include Steward Clerk and Steward Clerk Depute:

"County" shall include Stewartry.

No person to act as a procurator unless he is already or hereafter admitted pursuant to this Act.

II. No person shall hereafter act or practise as a Procurator before any Inferior Court, or assume the name or title of procurator, unless prior to the passing of this Act he shall have been duly admitted a Procurator, or unless subsequently to the passing of this Act he shall be admitted a Procurator pursuant to the directions and regulations of this Act.

Commissioners of Stamps not to issue Certificates except to persons.

III. From and after the passing of this Act the Commissioners of Stamps and Taxes and their officers shall, previous to issuing any stamped certificate to any person applying for the same who has not previously had issued to him a like certificate, require evidence that such person is either a Writer to the Signet, or a Solicitor before the Supreme Courts, or a Notary Public, or that he has been admitted a Procurator.

Requisites to entitle persons to be admitted.

IV. No person shall hereafter be deemed admissible as a Procurator unless he shall be of the full age of twenty-one years, and shall have been bound under an indenture in writing to serve, except as herein-after provided, at least four years as an apprentice to a master declared by this Act to be competent, and shall have duly served his said apprenticeship by personal attendance in the office of such master or in the office of some other master to whom his indenture may have been transferred, as herein-after provided, and unless he shall have been reported qualified for admission after an entrance examination in manner herein-after specified: Provided always, that any person who may before the passing of this Act have served, or may be at the date thereof in course of serving, an apprenticeship for a shorter term than four years, in such form as would have qualified him for admission under the provisions of the Act of Sederunt of the Lords of Council and Session, dated tenth day of *July* One thousand eight hundred and thirty nine, chapter five, shall be deemed admissible, in so far as regards apprenticeship, if he have served or shall serve, either as an apprentice or clerk to the same or some other competent master, such further term as may be sufficient along with his previous service to complete the full term of four years, and if he shall have been reported qualified as aforesaid, and such service may be instructed by a certificate

under the hand of such master, or otherwise, as herein-after provided.

V. Provided also, that any person who shall have taken a Degree in Arts in any one of the Universities of *Great Britain* or *Ireland*, or who shall be a member of any of the Councils of the *Scottish* Universities, shall be deemed admissible as a Procurator, in so far as regards apprenticeship, if he shall have served an apprenticeship under indenture as aforesaid for the shorter period of three years, and such person shall not be obliged as a part of his entrance examination to undergo an examination in general knowledge.

Requisites restricted in certain cases.

VI. In reference to all apprenticeships and clerkships to be entered into in terms of this Act, any Writer to the Signet or Solicitor before the Supreme Courts, or Procurator or Sheriff Clerk, shall be deemed a competent master in the case of a person seeking to qualify himself as a Procurator.

Who shall be deemed a competent master.

VII. In case any master with whom any person shall have entered into any apprenticeship or clerkship as aforesaid shall, during the currency of the term of such apprenticeship or clerkship die, or become bankrupt, or cease to practise, or be unable to continue to employ such apprentice or clerk, it shall be lawful for the Sheriff of the county or Sheriff Substitute of the county, ward, district, or division in which such apprenticeship or clerkship is being served, upon the application of such apprentice or clerk, as the case may be, to direct the indenture or agreement of clerkship to be discharged, or to authorize the term of service to be completed with any other master declared competent by this Act and named in such application, without prejudice to the voluntary transfer of any apprenticeship or clerkship to a competent master mutually agreed upon, and made in writing.

Provision in case master of persons entering into apprenticeship, &c. dies.

VIII. Any apprentice who, either before or after the passing of this Act, has entered into an indenture for any period exceeding three years, and who may be desirous of making himself acquainted with the forms of procedure in the Supreme Courts, or with the mode of conducting business in any county other than that in which he has bound himself to serve, may, in lieu of the last year of his said apprenticeship, with the consent of his master, substitute a term of service as clerk for not less than one year with a Writer to the Signet or Solicitor before the Supreme Courts, or with a Procurator practising in such other county, which service as clerk shall be equally effectual for the purpose of admission as if such apprentice had completed the full term of his apprenticeship.

One year of indenture under procurator may be commuted into clerkship.

IX. All indentures which shall after the passing of this Act be entered into with the intention of qualifying the apprentice for admission in terms of this Act shall be recorded in the Register of

Indentures to be recorded and

service to
be certified.

Probative Writs of the county where the same shall have been entered into, within six months from the date fixed therein for the commencement of the term of apprenticeship, and upon the expiration thereof such indenture, with a certificate endorsed thereon, under the hand of the master with whom such apprenticeship was completed, setting forth that the party has actually and *bona fide* served the apprenticeship set forth in the application for admission as required by this Act, may be received as evidence of such apprenticeship having been duly served.

Agreements
to serve as
clerk must
be in writing
and proved.

X. No service as clerk, in terms and for the purposes of this Act, entered into after the passing thereof, shall be held a qualification for admission as aforesaid, unless the agreement to serve as clerk for a specified time shall be entered into in writing before the commencement of service; and the production of a written agreement, with a certificate under the hand of the master of the time having been actually and *bona fide* served by personal attendance in his office, may be received as evidence of service; provided that in case of the death or incapacity of the master the Sheriff shall be entitled to receive such other evidence of service of apprenticeship or clerkship as shall seem to him reasonable and satisfactory.

Admission
and en-
trance ex-
amination.

XI. The admission of Procurators shall as heretofore proceed on the application of any duly qualified person to the Sheriff of the county within which he wishes to practise; but such applicant shall prior to admission, except as herein-after provided, undergo an entrance examination in regard both to general knowledge and to law, and legal training and practice, on a remit made by the Sheriff to the examiners herein-after mentioned, and no further procedure shall be had on such application until the applicant shall have been reported by the examiners qualified for admission: Provided always, that no entrance examination shall be required if the applicant for admission be a Writer to the Signet, or a Solicitor before the Supreme Courts, or hold a degree of Bachelor of Laws granted by a *Scottish* University after the twelfth day of *July* Eighteen hundred and sixty-two; nor shall the provisions of this Act in regard to the term of service apply to, nor shall any entrance examination in general knowledge be required from, any person who is under indenture at the passing of this Act, or who may have completed the term of apprenticeship prior to the passing of this Act; provided also, that the Sheriff of any county to whom an application for admission shall be made by any person who has been already admitted a Procurator in another Sheriff Court shall be entitled to admit the said person, and also to dispense with such entrance examination, if he shall see fit, after hearing the incorporated Faculty or Society of Procurators practising in the county, ward, district, or division in which such application is made.

XII. On the production of the certificate of apprenticeship or of

apprenticeship and clerkship, as herein-before provided, and of a certificate under the hands of the examiners of the applicant being duly qualified in regard both to general knowledge and to law and legal training, or of written evidence that the applicant falls within some of the exceptions herein-before contained, the Sheriff may, unless he see cause to the contrary, admit the applicant as a procurator in his court, and such admission shall qualify the person admitted to practise therein and in all the other Inferior Courts held within the county; provided that where the mode of admitting procurators in any county is regulated by Royal Charter conferring exclusive privileges on any Faculty or Society of Procurators practising in such county, or by any usage following thereon, such mode of admission shall not be altered by anything in this Act contained without the express consent of such Faculty or Society.

Mode of admission.

XIII. The Sheriff Clerk of each county, or of each ward, district, or division, when a county is so divided, shall keep a register in a separate book, to be called the "Register of Procurators," in which he shall insert the names of all such persons then in life as may have been duly admitted procurators before the Sheriff-Court of such county, ward, district, or division prior to the passing of this Act, and shall arrange such names in the order of the dates of admission of such persons respectively, and likewise of every person who shall subsequently to the passing of this Act be admitted a procurator before such court, pursuant to the directions and regulations herein contained, specifying in the register the date of such admission, and shall, as occasion requires, make the alterations on said register rendered necessary by death or otherwise, and said register shall be patent to all the lieges, and an extract therefrom subscribed by the sheriff clerk, certifying the admission of any procurator, and specifying the date thereof, and for which extract a fee of two shillings and sixpence shall be payable, shall be sufficient evidence of the facts therein set forth.

Names of procurators to be registered.

XIV. In any county, ward, district, or division of a county in which there does not at the date of the passing of this Act exist an Incorporated Faculty or Society of Procurators, it shall be lawful for the procurators of such county, ward, district, or division, provided their number exceeds ten, voluntarily to form themselves into a society, by the assent given in writing of at least three-fourths of their number, and on such writing being recorded in the court books of the county, district, division, or ward, such society shall *ipso facto* be held to be incorporated under such name or title as shall in such writing be fixed, and shall include all the procurators of such county, ward, district, or division, and thereafter such faculty or society shall have power in its corporate name to sue and be sued, and to acquire, hold, and transfer property, heritable and moveable, and also from time to time to adopt such constitution and bye-laws for the management of the affairs of the society as the

Procurators may form societies when number is ten or upwards.

sheriff of such county, ward, district, or division shall, on application made to him, approve of, and shall possess such other powers as by law belong to an incorporation.

How to be
incorporated when
number less
than ten.

XV. In the event of the number of procurators in any county, ward, district, or division being less than ten but more than three, it shall be competent to them, or to not less than three-fourths of their number, by their assent given in writing, to combine with the procurators in any one or more counties, wards, districts, or divisions, to form themselves into a society of procurators under this Act, provided the aggregate of the whole shall be at least ten; and on such assent being given in writing, and recorded in the court books of each of the said counties, wards, districts, or divisions, such society shall in all respects, for the purposes of this Act, be entitled to the same corporate powers and privileges as any other society formed under this Act; or otherwise, in the event of no such combination, the procurators of any county, ward, district, or division whose number is less than ten shall be entitled individually to become members of the society of procurators formed in any other county, ward, district, or division, in terms of this Act, and who shall be willing to receive them, and they shall on being duly admitted become members of said society: Provided always, that in case of the procurators in two or more counties combining to form a society as aforesaid, the Sheriff of the county having the largest number of procurators at the time such society is formed shall alone exercise the functions which are conferred on Sheriffs by this Act in relation to such societies.

Powers of
incorporated facul-
ties and
societies.

XVI. Every Faculty or Society of Procurators already incorporated, or which shall after the passing of this Act be incorporated, in terms thereof, shall from time to time, subject to the approval of the Sheriff, issue regulations for the preliminary examination in the elements of general knowledge of persons desirous of entering into indentures of apprenticeship with any procurator of their court or the sheriff's clerk, and without such examination, and the person undergoing the same being reported qualified, such indenture shall be of no force or effect for the purpose of admission as aforesaid; and such Society may also, if it sees fit, subject in like manner to the approval of the Sheriff, impose a curriculum of legal study on the apprentices serving their time to the members of such faculty or society, and may institute compulsory examinations in law and in legal training and practice of such apprentices at the end of the second, third, and fourth years of their apprenticeship, under such regulations as to extending the period of apprenticeship, in case of failure satisfactorily to undergo such examinations, as may be established by and under authority of the General Council herein-after appointed; and any society hereafter to be incorporated may establish a fund for the benefit of indigent members and of the widows and children of members, and provide for the use of the members

of the society a law library, to be managed in such manner as may be settled by the byelaws, and for these and other purposes may exact payment of such entrance fees from parties applying to be admitted as procurators, and such annual contribution from each member of the society, as may from time to time be fixed by the society, and be approved of by the sheriff as aforesaid; and in counties where no such society exists it shall be in the power of the sheriff to order and enforce the preliminary and intermediate examinations aforesaid.

XVII. The Dean, President, or other chief office bearer of each of the several Faculties or Societies of Procurators already incorporated, or which shall after the passing of this Act be incorporated in terms thereof, or in his absence the Sub-Dean, Vice-President, or other member of such faculty or society elected to act in his place, shall form a General Council of Procurators for the purpose of exercising the powers conferred upon them by this Act, and shall meet at least once in each year at such time and place as may be fixed in manner herein-after provided, any five members of such General Council being a quorum.

XVIII. The first meeting of such General Council shall be held at *Edinburgh* on *Monday* the thirtieth day of *October* One thousand eight hundred and sixty-five, at one o'clock, within the Sheriff Court-house, and the members present, after choosing an interim chairman, shall appoint a committee of their number to frame a draft of the byelaws herein-after mentioned, with instructions to report such draft to an adjourned meeting, to be held at a time and place to be then fixed; and it shall be lawful for such adjourned meeting, or any other meeting held by adjournment, to adopt the said byelaws with or without amendments.

XIX. The byelaws to be so framed and adopted shall provide for the yearly appointment of office bearers, and in particular of a President, and for the time and place of all meetings of the General Council and Office Bearers, and for the mode of calling the same, and for all other regulations necessary for beneficially transacting the business committed to the General Council by this Act, and for the future amendment of such bye-laws, if necessary.

XX. The General Council shall prescribe a curriculum of legal study for persons intending to apply for admission as Procurators, and shall by themselves, or by one or more Committees of their number, and with such assistance as the Council may see fit to appoint, act as examiners of persons applying for admission as procurators, and shall as soon as may be after the passing of this Act frame regulations as to the subjects both in general knowledge and law, and legal training and practice, in which all persons applying for admission after a certain date to be therein fixed shall be ex-

amined as herein-before provided, in order to ascertain that they are in these respects qualified for admission, and also regulations as to extending the period of apprenticeship of apprentices failing to undergo satisfactorily the compulsory examinations herein-before provided, and may, if need be, vary such curriculum and regulations to suit the peculiar circumstances of any county, and may also from time to time thereafter alter and amend such regulations respectively.

Such regulations to be submitted to Sheriffs convened as by 1 & 2 Vict. c. 119, and approved by Lord President, Lord Justice-Clerk, and Judges of the Court of Session.

XXI. The curriculum, regulations, and bye-laws to be framed by the General Council as aforesaid, or any future alterations or amendments thereof, shall be of no force or effect unless the same have been submitted to the Sheriffs of *Scotland* convened as directed by the Act first and second *Victoria*, chapter one hundred and nineteen, section thirty-two, and reported on by the meeting so convened, or any adjourned meeting of the Sheriffs, to the Lord President of the Court of Session, the Lord Justice Clerk, and the other Judges of the Court of Session, and have been approved of by them, and until the said regulations are so approved of the rules in operation in each county, ward, or district for the examination of persons applying for admission shall continue in force.

General Council to fix time and place and fees of examinations.

XXII. The General Council shall also from time to time fix the times and places at which such examinations may most conveniently be conducted, and shall also, subject to the approval aforesaid, fix the Fees to be paid by the applicants to defray the expense of such examinations and the application of the fees so paid.

Expenses of General Council how to be provided for.

XXII. The General Council may, from time to time, exact such contributions from the various Faculties and Societies already incorporated, or to be incorporated under this Act, as shall be required for the necessary expenditure of the General Council and office-bearers thereof, and that as nearly as may be in proportion to the numbers of members of such Faculties or Societies, and may recover payment of such contributions by action at law, to be brought in name of their President or of any of their office-bearers whom they may appoint for that purpose, an account of which contributions and expenditure shall be made up annually, and copies transmitted to the Dean, President, or other chief officer of every such Faculty or Society.

How procurator may be suspended from practice or struck off register.

XXIV. No person who has been admitted a Procurator in terms of this Act shall be liable to have his admission challenged or set aside on any ground except fraud; reserving, nevertheless, to and empowering the Sheriff of each county, ward, district, or division as aforesaid, on a written complaint made and cause shown to him by any incorporated Faculty or Society of Procurators practising in his court, and where there is no such Faculty or Society

then by any three or more procurators practising in such court, to call before him, on six days' induciæ, and thereafter, whether with or without compearance, to suspend from practice, or to strike off the register, the name of any procurator registered in his court whom he may deem guilty of gross misconduct, which sentence shall contain within itself a statement of the facts and grounds on which it proceeded, and shall be subject to review and stay of execution only by petition of appeal, to be presented within six months from the date of such sentence to the Inner House of the Court of Session sitting in either Division, who may hear any person interested thereon, and may confirm or reverse the sentence of the Sheriff, with or without further inquiry, without prejudice to the Sheriff and Sheriff-Substitute exercising all powers competent to them at common law in such matters.

XXV. Any procurator shall be entitled to complain to the Sheriff in whose court he is entitled to practise against any person practising in such court who is not a procurator thereof; and the Sheriff shall, on such complaint being proved to his satisfaction, interdict such person from practice; and any procurator who shall knowingly and wilfully lend his name to enable any person who is not a procurator to practise as such may, on a complaint made as aforesaid, be summarily suspended from practice or struck off the register, and the sentence of the Sheriff in either case shall be subject to review and stay of execution only in manner foreshadowed.

Power to procurators to complain to the sheriff of unqualified procurators. Penalty on procurator lending his name to unqualified persons.

XXVI. The sentence of any Sheriff striking a procurator off the register shall entitle any incorporated Faculty or Society as aforesaid of which he is a member to expel him from the body, and he shall thereupon forfeit all his rights and privileges as a member thereof, except his right to a share of any fund for behoof of widows or children: Provided that during the period allowed for appeal as aforesaid, and during the dependence of such appeal, the party against whom the Sheriff's sentence shall stand shall be disabled from exercising any of the rights, functions, and privileges of a procurator.

Effects of sheriff's sentence.

XXVII. Nothing in this Act contained shall be held to limit or prejudice the rights and privileges of the following public bodies; that is to say, the Society of Writers to Her Majesty's Signet, the Society of Solicitors in the Supreme Courts, the Society of Solicitors at Law, *Edinburgh*, the Faculty of Procurators in *Glasgow*, the Faculty of Procurators in *Paisley*, or the Society of Advocates in *Aberdeen*, or any other such Faculty or Society holding a royal charter: Provided always, that it shall be competent to any Faculty or Society of Procurators incorporated before the passing of this Act, notwithstanding the terms of their charter, to pass such bye-laws as may be necessary to assimilate, in whole or in

Nothing to prejudice privileges of certain public bodies.

Power to faculty, &c., to make bye-laws, and to alter its name.

part, the conditions and mode of admission to the privileges of their incorporation to the provisions of this Act; provided also, that it shall be competent to any such Faculty or Society of Procurators, if they shall so desire, by the assent given in writing of at least three-fourths of the members registered as herein-before provided, and on the register at the time, to alter its name or title without prejudice to its existing powers and privileges.

Saving
rights of
certain
persons.

XXVIII. Nothing in this Act contained shall be held to repeal the privileges conferred by former Acts of Parliament on persons who may be qualified to act as agents in the Court of Session of practising in certain cases before the Sheriff Courts of *Scotland*, or to prejudice or affect the rights or privileges of any person appointed to be Solicitor or Attorney on behalf of Her Majesty, under the orders or directions of the Commissioners of the Treasury, Customs, Inland Revenue, or under the orders or directions of any Commissioners or other persons or person having the management of any other branch of Her Majesty's Revenue for the time being, or under the authority of any Act of Parliament, or of any person now holding or who may hereafter be appointed to the office of Procurator-Fiscal in any Inferior Court.

Saving
rights of
notaries
public.

XXIX. Nothing in this Act contained shall prejudice the rights and privileges of Notaries Public, or affect the manner of their admission to office.

Short title.

XXX. This Act may be cited as "The Procurators (*Scotland*) Act, 1865."

34° & 35° VICTORIA.

CHAPTER CVII.

An Act for confirming and amending the Charter of, and re-incorporating, the Society of Solicitors in the Supreme Courts of Scotland; extending and defining its Rights and Privileges; raising and securing a Fund for the Widows and Children of Members; and other purposes.—[13 July 1871.]

A.D. 1871.

WHEREAS by a charter under the seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal thereof, dated the twenty-fourth day of January One thousand seven hundred and ninety-seven, and sealed the twenty-third day of February thereafter, James Bremner and the other persons therein named, all agents or solicitors before the Court of Session in Scot-

land duly admitted and enrolled in terms of the acts of sederunt of the said court, and all and every other person or persons admitted and enrolled as agents or solicitors in terms of the said acts of sederunt who should be admitted members of the Society, and also all and every person or persons who should thereafter be admitted and enrolled as solicitors before the said court in terms of and according to the said acts of sederunt of the said court, were erected and incorporated into a corporation or body politic by the name and title of "The Society of Solicitors in the Court of Session, Commission of Teinds, and High Court of Justiciary in Scotland," with perpetual duration and succession, with powers of administering, directing, regulating, and managing in all matters and concerns pertaining to the said Society, as also of acquiring and possessing lands and hereditaments, of suing and being sued, of having and using a common seal, of making bye-laws and regulations, and for other purposes, as more fully set forth in the said charter :

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And whereas various bye-laws and regulations have from time to time been made by the said Society, in virtue of the powers in the said charter for regulating the qualification and admission of entrants, and the management of the affairs of the said Society :

And whereas, at a general meeting of the said Society, held upon the twenty-seventh day of January one thousand eight hundred and seventeen, it was unanimously resolved that the establishment of a scheme for providing annuities to the widows of the members of the Society was a proper and expedient measure ; and at another general meeting of the Society, held on the second day of June one thousand eight hundred and seventeen, it was unanimously resolved to appropriate a certain sum of money from the funds of the Society to the fund of the widows' scheme, and also one half of the entry money payable by every future member of the Society, and the said sum of money was paid accordingly, and the one half of the said entry moneys has hitherto continued to be paid to the said scheme :

And whereas by a contract dated the first, third, and fourth July, tenth and eleventh November, and fifth December one thousand eight hundred and seventeen, and registered in the books of council and session second April one thousand eight hundred and nineteen, subscribed by the said James Bremner, Preses, and other members therein named and designed, of the said Society of Solicitors in the Supreme Courts of Scotland, a society was constituted, to be called and known by and under the name of "The Society of Contributors to the Widows' Scheme of the Solicitors of the Supreme Courts of Scotland," and a fund was created for the benefit of the widows of contributors to the said scheme, and provision was thereby made for the admission of all members and future entrants to the said Society or corporation of solicitors who should accede to the said scheme as contributors thereto, and for the payment of annual rates and marriage and equalisation taxes as therein specified, and for the

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payment of annuities to the widows of the contributors, and for the election of trustees for the management of the funds and property of the said scheme :

And whereas the said widows' scheme has been of great benefit to the widows of the contributors ; but only a limited number of the members of the Society have hitherto been contributors to the scheme :

And whereas various alterations of the said contract have from time to time been made by minutes and resolutions of general meetings of the Society of Contributors to the said scheme, in pursuance of the provisions of the said contract :

And whereas the annuity now payable from the said scheme to each of the said widows is forty-two pounds per annum, and it is calculated that the funds of the said scheme will continue to yield a like annuity to each of such widows :

And whereas the Society, being of opinion that it would be for the advantage of the Society and the said scheme, and of the future entrants to the Society, if the scheme were extended, and it were made compulsory on all future entrants to become contributors to the said scheme, at a general meeting held on or about the seventh day of June one thousand eight hundred and sixty-nine, resolved to make it compulsory upon all future entrants to join the said scheme, and at subsequent general meetings the Society have ratified and confirmed the said resolution :

And whereas the contributors have concurred in and approved of this resolution, and are desirous that the same should be carried into effect :

And whereas since the date of the said contract the funds of the Society and the number of its members have largely increased, the funds and property of the Society now amounting to the sum of six thousand three hundred and eighty-three pounds and one penny as set forth in Schedule (A.) hereunto annexed, and the funds and property belonging to the Widows' Scheme of the Society now amounting to the sum of twenty-seven thousand nine hundred and fifty-eight pounds nine shillings and fivepence as set forth in Schedule (B.) hereunto annexed :

And whereas it is expedient to consolidate, amend, and enlarge the powers conferred upon the Society and the members thereof, by the said charter, and to incorporate the same of new, to improve the qualifications of candidates for admission to the said Society, and to regulate the mode of admission of members :

And whereas it is expedient that it should be compulsory on all future entrants to the Society to join the said scheme, and that the benefits thereof should be extended to the children of deceased contributors whose widows shall die before such children shall have attained the age of twenty-one years, and to make provision for maintaining, continuing, and enlarging a fund for the benefit of the widows and children of members, and that the funds and property of the existing widows' scheme should be transferred to, and vested

in, the Society, to be held by them for the purposes appointed by this Act; but these objects cannot be obtained without the authority of Parliament: A.D. 1871

May it therefore please Your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may for all purposes be cited as "The Solicitors in the Supreme Courts of Scotland Act, 1871." Short title.

2. The following words and expressions in this Act shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction: Interpretation of terms.

"The Society" shall mean "the Society of Solicitors in the Court of Session, Commission of Teinds, and High Court of Justiciary in Scotland," incorporated by the said Royal Charter, and as re-incorporated by this Act under the name of "The Society of Solicitors in the Supreme Courts of Scotland:"

"President," "vice-president," "treasurer," and "secretary," shall mean the president, vice-president, treasurer, and secretary of the Society for the time being:

"Member or members" shall mean a member or members of the Society for the time being:

"The existing fund" shall mean the fund created under the contract herein-before recited:

"The fund" shall mean the fund for the benefit of the widows and children of members of the Society as continued and extended by this Act:

"Contributions" shall mean and include the several contributions, rates, or payments to the fund:

"Contributors" shall mean and include contributors to the existing fund and to the fund:

"The collector" shall mean the collector of the fund for the time being.

3. The before-recited Royal Charter, so far as not altered by this Act, is hereby ratified and confirmed. Ratification of charter.

4. The present members of the Society, and all persons who shall hereafter become members of the same, are hereby, for the purposes of this Act, of new incorporated into one body politic and corporate, under the name of "the Society of Solicitors in the Supreme Courts of Scotland," and as such shall have perpetual succession and a common seal, and all the other privileges of a body corporate, and by that name may sue and be sued, and may purchase, acquire, and hold lands and heritages for the use of the

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Society without any restriction as to the value of the lands and heritages to be held by them, and may sell and dispose of the same.

Transfer to re-incorporated society of property of present society and widows' fund.

5. The whole property, estate, and effects, heritable and moveable, real and personal, stocks, securities, and money, which at the passing of this Act may belong to the Society and the existing fund respectively, shall from and after the passing of this Act be and the same are hereby transferred to and vested in the Society for the purposes of this Act, and subject to all existing obligations.

Debts due to or by the society to be paid.

6. All persons who before the passing of this Act were indebted or owing any sums of money to the Society, or the existing fund, or to any person on their behalf, shall pay the same, with all interest due and payable thereon, or accruing for the same, to the Society or their treasurer or collector for the time respectively, and all moneys which immediately before the passing of this Act were due or owing by or recoverable from the Society, or the existing fund, or for the payment and satisfaction of which they were, or but for this Act would be liable, shall, with all interest due or to accrue thereon, be paid by or recoverable from or be satisfied by the Society.

Actions, &c. not to abate.

7. No action, suit, prosecution, or other proceeding commenced either by or against the Society, or their clerk, treasurer, collector, or other officer on their behalf, before the passing of this Act or otherwise, shall abate, or be discontinued, or prejudicially affected by this Act, but on the contrary shall continue and take effect, whether in favour of or against the Society, in like manner in all respects as the same would have continued and taken effect if this Act had not been passed.

Office-bearers.

8. The office-bearers of the Society shall consist of a president, vice-president, treasurer, secretary, librarian, fiscal, and collector, who shall be members of the Society, and who, along with seven other members of the Society to be elected as herein-after provided, shall form the council of the Society: Provided always, that nothing herein contained shall prevent the same person from being appointed both treasurer and collector.

Stated general meetings.

9. There shall be three general meetings of the Society in each year, viz., one on the first Tuesday of March, another on the first Tuesday of June, and the third on the first Tuesday of December; and any of the said meetings may be adjourned from time to time, as the meeting shall see fit.

Special general meetings, and how to be called.

10. It shall be in the power of the president, or, in his absence, of the vice-president, to convene a special general meeting of the Society, at any time when deemed necessary; and if a requisition, signed by at least ten members, be delivered to the president,

requesting him to call a special general meeting of the Society, and stating the object of such meeting, he, or in his absence the vice-president, shall direct a special general meeting to be called, to take place not later than one week after such requisition is delivered to him.

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11. At all meetings of the Society any number of members present shall form a quorum, and all matters brought before such meeting shall be determined by a majority of votes; and the president, if present, or in his absence the vice-president, and in the absence of both, any member to be chosen by the meeting, shall be chairman of the meeting; and such chairman, in case of equality of votes, shall have both a deliberative and casting vote.

Quorum
and chair-
man at
meetings.

12. The office-bearers of the Society, and also two censors and two auditors, shall be elected annually at the stated general meeting in June; and any of the office-bearers, censors, and auditors may be re-elected, provided that the office-bearers, censors, auditors, and collector of the existing fund elected in June one thousand eight hundred and seventy-one shall continue in office till the general meeting in June one thousand eight hundred and seventy-two.

Election of
office-
bearers.

13. The seven ordinary members of council at present acting shall remain in office until the general meeting in June one thousand eight hundred and seventy-one, when the two members at the top of the list shall retire, and two other members shall be elected in their stead, and the names of the persons so chosen shall be put at the bottom of the list; and thereafter, at the aforesaid meeting in June of each year, the two members at the top of the list shall go out of office, and two others shall be chosen in their places in manner aforesaid: Provided always, that any ordinary member of council may be re-elected after having been one year out of office, and that the retiring president may be elected one of the ordinary members of council; and provided further, that at least three of the contributors shall be members of the council; in the event of any vacancy occurring among the office-bearers, or ordinary members of council, a member to supply such vacancy may be elected either at the next stated general meeting or at a special general meeting to be called for that purpose.

Council
and their
election.

14. The council may be convened at any time by direction of the president, or in his absence the vice-president, and it shall be the duty of the council to deliberate and advise on matters affecting the interests and to manage the affairs of the Society and fund, and they shall also bring before the Society such matters as they consider proper, and dispose of all business referred to them by the Society, or make reports or give recommendations as to the same, and perform such acts and duties as the said recited charter or this Act and the customs and usages of the Society may authorise: Any

Meetings
and duties
of council,

A.D. 1871 three members of council along with the president, or in his absence the vice-president, shall be a quorum.

Quorum of council.
Powers and duties of treasurer.

15. The treasurer shall have power to receive and discharge the dues of admission, annual subsidies, or subscriptions, and the whole other income, and to manage the monetary concerns of the Society, under the direction of the council: he shall keep regular books, in such form as shall be prescribed by the council, and shall make up, at least once every year (or oftener if required), and in time to be laid before the general meeting in June, a complete statement of his intromissions, with a list of arrears, which statement shall be audited by the auditors previous to such meeting.

Powers and duties of collector.

16. The collector shall have power to receive and discharge the whole income of the fund and pay the annuities, and to negotiate and transact, under the direction of the council, the investments of the moneys belonging to the fund, and all the ordinary business relating to the fund, and generally to carry into effect the resolutions and instructions of the Society and council: he shall keep regular books, in such form as shall be prescribed by the council, and shall make up at least once every year (or oftener if required), and in time to be laid before the general meeting in June, a complete statement of his intromissions, with a list of arrears, which statement shall be audited by the auditors previous to such meeting; and he shall also make up annually and lay before such meeting full lists or schedules in such form as shall be prescribed by the council, showing the particulars of the changes which have taken place in the statistics of the contributors and their wives, widows, and families, through admissions, marriages, deaths, or otherwise.

Security to be found by treasurer and collector.

17. The treasurer and collector shall each find security for his intromissions and management to the satisfaction of the council to such extent and subject to such conditions as the Society shall fix.

Moneys to be deposited in bank.

18. All moneys paid to and received by the treasurer and collector shall be deposited in the name of the Society in two distinct accounts in a bank or banks in Edinburgh, to be fixed by the council, and the treasurer or collector shall never at any time hold in his hands above thirty pounds of the money belonging to the Society or fund.

Duties of secretary.

19. It shall be the duty of the secretary to attend the meetings of the Society and council, and frame the minutes of the proceedings: he shall also keep a minute book, in which shall be engrossed all the proceedings of the Society, and shall cause intimation of all meetings to be made to the members in terms of the byelaws.

20. It shall be in the power of the Society from time to time to pay the treasurer and secretary such salary or allowance out of the funds of the Society, and to the collector such salary or allowance out of the fund, as they shall think fit.

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Salaries of treasurer, secretary, and collector.

21. The Society shall also have power to apply the funds of the Society, other than those specially applicable to the annuities, in extending and improving the library, and paying any necessary salaries or allowances in connection therewith, in purchasing, erecting, or fitting up a hall for the use of the Society, in making allowances, if they see cause, for decayed members or their families, and for such other purposes as the Society may consider conducive to its interests.

Application of society's funds.

22. From and after the passing of this Act no person under the age of sixteen shall be taken as an apprentice by a member, and no apprentice shall be taken for a shorter period of service than five years: all apprentices shall, before entering into indenture, produce to the council satisfactory evidence of their proficiency in the following subjects of study, namely: 1. English literature, including grammar and composition; 2. Geography and history; 3. Latin; 4. Arithmetic; and 5. Mathematics. It shall be sufficient evidence of such proficiency that the intending apprentice has (1) attended one or more classes in the faculty of arts for two winter sessions at any of the universities in Scotland; or (2) attended five years at the High School of Edinburgh or the Edinburgh Academy, or at such other schools or institutions as shall be approved of by the council as equivalent thereto, and also one or more classes in the faculty of arts for one winter session at any of the said universities, or given such attendance at any of the universities or colleges in England or Ireland as shall appear to the council to be equivalent to the attendance required at the Scottish universities, the humanity class for one session, in case of attendance at a Scottish university, being one of the classes; or (3) in the event of the intending apprentice not being qualified as above described, the council, provided he shall have attended any two of the classes in the faculty of arts, the humanity class being one, for one winter session, in any of the Scottish universities, may direct an examination in writing on the subjects above specified, and on receiving a satisfactory report from the examiners may allow the applicant to enter into indenture.

Qualifications of apprentices.

23. All indentures entered into after the passing of this Act shall be lodged with the secretary for the purpose of being recorded within three months from the date of the commencement of the apprenticeship, and the council shall have the power to authorise any indenture to be transferred to another member of the Society.

Indentures may be transferred.

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Qualifications of members.

24. No person shall hereafter be admissible as a member under twenty-two years of age, nor (except as herein-after provided) unless he has served either, (1) a regular apprenticeship to a member; or, (2) three years as an apprentice to a procurator in the sheriff courts, and shall have passed the examinations required by "The Procurators (Scotland) Act, 1865," and also three years as clerk in the office of a member, or of a writer to the signet; or (3) three years as clerk in the office of a member, or of a writer to the signet, and shall have obtained the degree of Master of Arts or Bachelor of Arts in any of the universities of the United Kingdom, or the degree of Bachelor of Laws in any of the Scottish universities; or, (4) six years as clerk in the office of a member, or of a writer to the signet, and shall satisfy the council that he has received a liberal education: Provided always, that any person who shall have been in practice for at least three years as an admitted procurator before one of the sheriff courts of Scotland, and is either a member of the general council of one of the Scottish universities, or has attended at least two law classes in some of the Scottish universities, shall also be admissible as a member.

Applications for admission of members and their examination.

25. Every applicant for admission as a member shall lodge a written requisition to that effect with the council, and shall produce a certificate by the censors of good moral character, and where he applies under the proviso to the immediately preceding section, he shall produce evidence of his possessing the qualifications thereby required, and the council shall thereupon remit him to the examiners for examination upon the practice and forms of procedure before the supreme courts, and, if he be found duly qualified therein, the secretary shall present a petition to the Lords of Council and Session for his admission, and every other applicant for admission shall produce certificates of attendance for two full sessions at one or more classes in the faculty of arts in any of the universities of the United Kingdom, and also three full sessions at the law classes in any of the Scottish universities; viz., one session at Scots law, and one session at conveyancing, together with a second session at either of these, or a session at any other class in the Faculty of Law; and thereupon the council shall remit the applicant to the examiners for examination as to his professional knowledge and legal training; and any applicant not qualified in terms of the first and third conditions of the immediately preceding section, or of the proviso thereto, shall, in addition to an examination in professional knowledge and practice, undergo an examination in the subjects specified in the section relating to the qualification of apprentices, and also logic or metaphysics and moral philosophy or natural science; and upon the examiners granting a certificate that the applicant is duly qualified, the secretary shall present a petition to the Lords of Council and Session for his admission.

26. Any person who at the passing of this Act is qualified to

apply for admission as a member under the existing regulations of the Society, and any person who has commenced an apprenticeship prior to the passing of this Act, shall be entitled to apply for admission under the existing regulations, provided his application is presented within six years from the passing of this Act; and any person who at the date of the passing of this Act has completed, or is in course of completing, such service as a clerk as by the existing regulations would qualify him for admission as a member, shall be entitled to apply for admission under these regulations, provided his application is presented within three years from the passing of this Act.

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Persons qualified under existing regulations how to be admitted.

27. The Society shall annually at the stated general meeting in June elect such number of members as may from time to time be considered expedient to act, along with the office-bearers, as examiners; and the examiners may select two or more persons of learning to assist in conducting the examination.

Election of examiners.

28. The Society may from time to time make such alterations on the foreshaid regulations as to apprenticeship and clerkship, and the course of study and examinations, and the qualifications of applicants for membership, as they may consider proper: Provided always, that such alterations shall, within one month after the date of their being adopted by the Society, be reported to the Lord President of the Court of Session, and the Court shall have power to vary the same as they shall think fit; and such alterations, with such variations, if any, as may have been made therein by the Court, shall take effect upon the expiration of three months after they have been adopted by the Society.

Power to alter regulations as to apprentices, clerks, and applicants.

29. The council may, on a report by the fiscal of the Society or on the presentation of a complaint by any person aggrieved by the conduct of a member, inquire into any allegations affecting the professional character of a member; and, if they shall see cause after such inquiry, may suspend such member from practising as a solicitor in the supreme courts for any period not exceeding two years; and such member shall, during the period of such suspension, be debarred from exercising or enjoying any of the rights or privileges of a member; and if it shall appear to the council that the conduct of the member has been such as to warrant his expulsion from the Society, they shall direct their fiscal to present a petition to the Lord President and the other judges of the Court of Session, setting forth the resolution of the council on the subject, and the Court shall have power by either of its Divisions to deal with the petition as they shall think fit, and if they see cause pronounce sentence of expulsion; and any member against whom such sentence shall have been pronounced shall from and after the date of such sentence, forfeit all his rights and privileges as a member of the Society; Provided always, that such expulsion shall not affect the

Power to suspend and expel members.

A.D. 1871 — rights, if any, of the widow and children of such member to participate in the fund, nor his obligations as a contributor in terms of the provisions herein contained.

Dues of admission and subsidies payable by members.

30. Every applicant for admission shall, on presenting his requisition for admission, pay to the treasurer such dues of admission as shall from time to time be fixed by the Society, subject to the approval of the Lord President of the Court of Session; and every member shall during his life pay to the treasurer such subsidies or annual subscriptions as shall from time to time be fixed by the Society; and if any member shall allow three full years' subsidies or annual subscriptions to run into arrear, it shall be in the power of the Society to suspend such member, and while such suspension subsists, he shall be debarred from exercising or enjoying any of the rights or privileges of a member of the Society.

Property of widows' fund vested in society in trust.

Purposes of trust.

Property to be kept separate.

Management and voting.

31. The property, estate, and effects, heritable and movable, stocks, securities, and money belonging to the existing fund, which are herein-before vested in the Society, and which may belong to the fund, and all contributions to be received for the fund, and whole income thereof, shall be termed "The Widows' Fund of the Solicitors in the Supreme Courts of Scotland," and shall be held by the Society in trust in the first place for payment of the expenses of management of the fund, and in the second place for payment of the annuities to the widows and children of contributors as herein-after provided, and for no other purpose whatever, and with all the powers and privileges herein contained, and shall be kept separate and distinct from the other funds of the Society, and the administration and management thereof are hereby vested in the Society, and thereupon the said Society called "The Society of Contributors to the Widows' Scheme of the Solicitors of the Supreme Courts of Scotland" shall be dissolved, cease, and determine: Provided always, that in all matters relating to the fund, which may be dealt with at any meeting of the Society, only those members who are contributors to the fund shall be entitled to vote.

Annual rate payable by contributors to existing fund.

Marriage tax.

32. Every contributor to the existing fund shall be a contributor to the fund, and shall pay to the collector an annual rate of five pounds five shillings at the term of Whitsunday yearly, during his life; and any such contributor who may marry after the passing of this Act, and whose age exceeds that of his wife five years, shall also pay to the collector, at the first term of Whitsunday or Martinmas after his marriage, a marriage tax as follows: viz., if his age does not exceed that of his wife six years, three pounds; if his age does not exceed that of his wife seven years, six pounds; and so on progressively, at the rate of three pounds sterling for every year the age of such contributor exceeds that of his wife more than five years; and which marriage tax shall also be payable upon each second or succeeding marriage; and every such contributor, pro-

vided his age exceeded forty when he became a contributor, shall farther, at the first of the said terms after his marriage, pay as equalisation tax, if his age did not exceed fifty years, fifteen pounds, and if it exceeded fifty years, thirty pounds.

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Equalisation
tax.

33. Every contributor to the existing fund shall be entitled to have the benefit of the fund for behoof of his children, as after provided, if he shall, within one year from the passing of this Act, intimate in writing to the collector that he is desirous of claiming such benefit; and thereupon he shall pay to the collector the sum of one pound one shilling sterling as at the date of the passing of this Act, and at every term of Whitsunday thereafter during his life, along with the annual rate of five pounds five shillings.

Present
contributors
may join
fund for
children.

34. There shall be paid by the treasurer to the collector the sum of thirty-five pounds out of the dues of admission to be received from each member of the Society who may be admitted after the passing of this Act, immediately after the said dues of admission shall be received by the treasurer: Provided always, that the treasurer shall not be bound to pay to the collector, out of the dues of admission, any larger proportion thereof than shall leave for the general funds of the Society a sum equal to one half of the dues of admission which would have been payable by such member prior to the twenty-ninth day of January one thousand eight hundred and sixty-nine; and also that where the sum paid the collector from the dues of admission of any member shall be under thirty-five pounds, such member shall pay the collector the deficiency or sum requisite to make up the said sum of thirty-five pounds.

Sum to be
paid to
widows'
fund from
admission
dues.

35. Every member who at the passing of this Act is not a contributor to the existing fund may become a contributor, and obtain the benefit of the fund for his widow and children, if he shall, within one year from the passing of this Act, intimate in writing to the collector that he is desirous of claiming such benefit, and produce to the council evidence of his age, and a certificate by a medical practitioner to be named by the council, that he does not labour under any disease particularly tending to shorten life; and such contributor shall pay ten pounds of entry money, and also an annual rate of six pounds six shillings at the first term of Whitsunday or Martinmas after the passing of this Act, and the like annual rate at the next term of Whitsunday, and so on yearly at each term of Whitsunday thereafter during his life; and if he is above twenty-five years of age when he becomes a contributor he shall also, if married, then pay to the collector an age tax at the rate of five pounds twelve shillings and sixpence sterling for each year or part of a year that his age exceeds twenty-five; and, if unmarried, he shall upon his marriage pay the said age tax for each year or part of a year that his age exceeded twenty-five when he became a contributor, with interest thereon at the rate of four per centum per annum from that date to the date of his marriage.

Terms on
which
present
members
who are not
contributors
may join
widows'
fund.

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Future members to be contributors, rates and age tax to be paid by them.

36. Every person who shall be admitted a member after the passing of the Act shall, in consequence of his admission, be held to be a contributor, and shall pay to the collector an annual rate of six pounds six shillings, at the first term of Whitsunday or Martinmas after his admission, and the like sum at the next term of Whitsunday, and so on yearly at each term of Whitsunday thereafter during his life; and if he is above twenty-five years of age at the date of admission, he shall also, if married, pay to the collector at that date an age tax at the rate of five pounds twelve shillings and sixpence for each year or part of a year that his age exceeds twenty-five; and, if unmarried, he shall upon his marriage pay the said age tax for each year or part of a year that his age exceeds twenty-five at the date of his admission, with interest thereon at the rate of four per centum per annum from that date to the date of his marriage.

Contributors in arrear to pay interest and 10 per cent. additional, and arrears of contributor dying to be deducted from annuity.

37. If the contributions herein specified, or any of them, shall not be paid when they respectively fall due, the same shall bear interest at the rate of five per centum per annum from the date of payment until paid, and, if not paid within three months from the date of payment, a sum of ten per centum shall be added to the whole amount of arrears and interest, and be payable by such contributor; and in the event of such contributor dying while in arrear, such arrear, with interest and per-centage as aforesaid, shall be deducted from the annuity payable to his widow and children.

Council may declare forfeiture for nonpayment of contributions, and terms on which contributors may be restored within three years of forfeiture.

38. The Society shall have right to sue for and recover payment from any contributor of all sums due by him to the fund, and to use all means competent to recover and enforce payment thereof; and if the contributions payable by any contributor shall remain unpaid for two years, it shall be in the power of the council to declare that he has for himself and his widow and children forfeited all right to and interest in the fund, and he shall thereupon cease to be a contributor: Provided always, that any contributor who incurs such forfeiture shall be entitled to be restored to the benefit of the fund, as if he had not incurred such forfeiture, on his producing a certificate by a medical practitioner appointed by the council, or other evidence satisfactory to the council, that he is in good health, and on his paying up the whole contributions due by him with interest at the rate of five pounds per centum per annum, and the additional sum of ten per centum on such amount of arrears and interest, and a penalty of twenty pounds: Provided also, that no contributor shall be so restored after the lapse of three years from the date at which such forfeiture was declared by the council.

Power to contributors to redeem annual rates.

39. Any contributor may redeem the annual rate payable by him by paying to the collector the calculated value of such rate, according to his age at the time of redemption, as the said value is specified in Schedule (C.) annexed to this Act, or in any amended

schedule approved of by resolution of the Society, upon the report of the actuary or actuaries to be employed at any periodical investigations of the fund: Provided always, that such contributor shall, notwithstanding the redemption of his annual rate, be liable in payment of age, marriage, and equalisation taxes as above provided.

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40. Every person who becomes a contributor after the passing of this Act shall at the same time lodge with the collector evidence of his age, and also, if married, evidence of his marriage and of the age of his wife; and every contributor marrying after the passing of this Act shall, within six months after his marriage, lodge with the collector evidence of his marriage, and of the age of his wife; and any contributor neglecting, within the time hereby limited, to lodge such evidence, shall incur a penalty of ten pounds, to be paid to the collector; and if any contributor shall die without having lodged evidence of his marriage with the collector, the widow and children of such contributor shall have no claim to any annuity out of the fund, until such evidence shall be produced to the satisfaction of the council, and such annuity shall only commence to run from the date when such evidence is produced.

Contributors to produce evidence of age and marriage.

Penalty for neglect, and annuity only to be payable from date of production of evidence of marriage.

41. An annuity of forty-two pounds shall be paid out of the fund to each widow on the roll of the existing fund, during her life, half-yearly, in equal portions, in advance, at Whitsunday and Martinmas, commencing the first half-yearly payment at the first term of Whitsunday or Martinmas after the passing of this Act; and the said annuities shall be first and preferable charges on the capital, revenues, and income of the fund, and shall be paid in priority to the annuities to the widows and children of any contributor who may die after the passing of this Act: and a like annuity of forty-two pounds shall be paid out of the fund to the widow of every contributor who, at the time of his death, shall be entitled to the benefit of the fund, for behoof of his widow under the provisions of this Act during her life, half-yearly, commencing the first half-yearly payment in advance at the first of the said terms which shall happen after the death of such contributor: Provided always, that the last-mentioned annuities to the widows of the contributors who shall die after the passing of this Act shall be subject to restriction as hereinafter mentioned, and that the annuity payable to any widow under this Act shall cease at twelve o'clock noon on the fifteenth day of May or the eleventh day of November preceding the death or subsequent marriage of the widow.

Annuities to widows.

42. If any contributor entitled to the benefit of the fund for behoof of his children shall die after the passing of this Act without leaving a widow, but leaving a lawful child or children in minority, or if the widow of any such contributor die or marry while there exist a child or children of such contributor in minority, the

Annuities to minor children if no widow of contributor.

A.D. 1871

Investment
of funds.

51. The moneys belonging to the Society and to the fund may from time to time be invested on heritable securities in Great Britain, or in the purchase of a hall and library for the Society, or a site or sites for the erection thereof, feu duties, Government stocks or securities, stock of the Bank of England, stocks or shares of any Bank in Scotland incorporated by Royal Charter or Act of Parliament, or in the debentures or mortgages of any company, trust, or corporation incorporated by Act of Parliament, and the council may from time to time change the said investments, and re-invest the proceeds thereof in other the like investments.

Power to
make bye-
laws, and
existing
bye-laws to
continue
until altered.

52. The Society shall have power at any general or special general meeting, on intimation of the purpose of such meeting, from time to time to make and ordain such rules and byelaws as they shall deem proper for the management and administration of the affairs both of the Society and of the fund: Provided always, that the rules and byelaws in operation at the passing of this Act shall, except so far as inconsistent with this Act, continue in force until altered, and that no motion for the alteration of any existing rule or byelaw, or the adoption of any new rule or byelaw, shall be taken into consideration until it shall have been made and seconded at a general meeting, and such motion shall be disposed of at the next general meeting.

Saving any
future Act
relating to
privileges.

53. Nothing in this Act contained shall interfere with the provisions of any Act of Parliament which may hereafter be passed for the abolition of exclusive privileges, or for enabling any duly qualified persons to practise in any court in Scotland.

Expenses of
Act.

54. All the costs, charges, and expenses of and incidental to the applying for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid, to the extent of one half thereof, out of the fund, and to the extent of one half thereof by the Society out of its funds.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A.)

FUNDS AND PROPERTY BELONGING TO THE SOCIETY.

I.—Debenture by the Caledonian Railway Company, No. 2/1326, dated 18th November 1868, in favour of John Carmont, Preses of the Society of Solicitors, Supreme Courts of Scotland, and others, for behoof of said Society . £1,000 0 0

		A.D. 1871
II.—Debenture by the Caledonian Railway Company, No. 2/2080, dated 5th July 1869, in favour of the Society of Solicitors before the Court of Session, Commission of Teinds, and High Court of Justiciary, incorporated by Royal Charter	£1,000	0 0
III.—Debenture by North British Railway Company, No. A/2055, dated 23d July 1868, in favour of John Carment, Preses of the Society of Solicitors, Supreme Courts of Scotland, and others, for behoof of said Society	1,000	0 0
IV.—Sum in account-current, as at 15th May 1870, with Clydesdale Banking Company in favour of the Society of Solicitors, and to be operated on by cheques, signed by the preses, vice-preses, secretary, and treasurer, or any three of them	883	0 1
V.—Law and other books in library, above 7,700 vols., estimated at	2,000	0 0
VI.—Furniture, fittings, and other effects in library, estimated at	500	0 0
	<hr/>	<hr/>
	£6,383	0 1

JAMES YOUNG,
Secretary to the Society.

SCHEDULE (B.)

FUNDS AND PROPERTY BELONGING TO THE WIDOWS' SCHEME OF THE SOCIETY.

I.—Right of mid-superiority of heritable subjects Nos. 5, 6, and 7, Rutland Square, Edinburgh, yielding nett annual feu duties amounting to £60, at 25 years' purchase	£1,500	0 0
II.—Right of mid-superiority of heritable subjects in Preston Street, Edinburgh, yielding net annual feu duties amounting to £23, 15s., at 21 years' purchase	498	15 0
III.—Sums lent on heritable security in name of trustees for behoof of scheme	1,630	0 0
IV.—Mortgage by the Glasgow and South-western Railway Company, No. 498, dated 21st December 1858, in favour of trustees for behoof foresaid	2,000	0 0
	2	£

A.D. 1873 — of any person to act as a Law Agent, it shall be lawful for the Judges of the Court (or any seven or more of them, of whom the Lord President and the Lord Justice Clerk shall be two), from time to time to nominate and appoint fit and proper persons to be Examiners for the purposes of this Act; and it shall be lawful for the said Judges from time to time to prescribe the subjects of examination in law and general knowledge, and to make rules for conducting such examinations,⁽ⁿ⁾ and also for entrance examinations of apprentices, and intermediate examinations.^(o)

Quorum of examiners, fees of examination, &c.

9. Three Examiners shall be a quorum at any examination, and the Examiners present shall appoint one of their number to be chairman, and each applicant shall, prior to his examination, pay two guineas to the chairman to be divided among the Examiners present.^(p)

Exceptions to the rule that applicant shall undergo examination as to fitness to practise.

10. During the period of three years immediately following the passing of this Act, it shall be lawful for the Court to admit an applicant although he shall not have complied with the provisions of this Act with respect to qualifications for admission, provided he shall establish to the satisfaction of the Court that at the date of the passing of this Act—

- (1.) He was entitled to be admitted a Procurator under "The Procurators (Scotland) Act, 1865;" or
- (2.) He was in course of qualifying himself for admission according to the provisions of "The Procurators (Scotland) Act, 1865," and that at the date of his application he would according to these provisions have been qualified to be taken upon examination by the Examiners under that Act, and shall undergo an examination under this Act; but no person who was under indenture at the passing of "The Procurators (Scotland) Act, 1865," or who had completed his term of apprenticeship prior to the passing of that Act, shall be required to undergo an examination in general knowledge under this Act.
- (3.) He had been remitted to the General Council of Procurators for examination, and is before first October next certified by them to be qualified.^(q)

Appointment and duties of Registrar.

11. One of the principal, depute, or assistant, clerks of session to be nominated from time to time by the Lord President and Lord Justice Clerk, shall be the Registrar of Law Agents under this Act.^(r)

⁽ⁿ⁾ *Ante*, pp. 43-44.

^(o) *Ante*, pp. 27 and 37.

^(p) *Ante*, p. 44.

^(q) *Ante*, p. 44 *et seq.*

^(r) *Ante*, p. 49.

It shall be the duty of the Registrar to keep an alphabetical register of all enrolled Law Agents,(s) and enrolment in such register shall be deemed to be enrolment under this Act,(t) and he shall strike out the name of any Law Agent on an order of the Court, or on application made to him by such Agent in writing to that effect;(u) and he shall on the application of any enrolled Law Agent grant a certificate of his enrolment,(x) and shall receive for each enrolment in the register and certificate of enrolment a fee of two shillings and sixpence. The register shall be kept in the office, in the register house, of the principal, depute, or assistant, clerk of session acting for the time as Registrar, and the Registrar shall, in keeping the same, and generally in the discharge of his duties,(y) give obedience to such directions as he may from time to time receive from the Lord President and Lord Justice Clerk.

A.D. 1873

12. A roll of the Law Agents practising before the Court of Session shall be kept by the clerk of the Lord President in such form as the Lord President may direct, and every enrolled Law Agent who has paid the stamp duty exigible by law on admission to practise as an agent before the Court of Session(z) shall be entitled to subscribe the said roll, and the said clerk shall be paid a fee of five shillings for each subscription, and every Agent shall, on subscribing the said roll, deliver to the said clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same.(a)

Roll to be kept of Agents practising in the Court of Session.

13. A roll of Agents practising in any Sheriff Court shall be kept by the Sheriff-Clerk in such form as the Lord President of the Court of Session may direct, and every enrolled Law Agent who has paid the stamp duty exigible by law on admission to practise as an Agent before a Sheriff Court(b) shall be entitled to subscribe the said roll, and the Sheriff Clerk shall be paid a fee of five shillings for each subscription, and every Agent shall, on subscribing the said roll, deliver to the Sheriff Clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same.(c)

Roll to be kept of Agents practising in the Sheriff Courts.

14. It shall be lawful for the Lord President of the Court of Session from time to time to issue rules and directions with respect

Lord President may make rules for keeping and subscribing rolls.

(s) *Ante*, p. 49.

(t) See sects. 3, 4, and 7.

(u) See sect 14, and *ante*, p. 357.(x) *Ante*, p. 51.(y) As to the duties of the Registrar in regard to the intimation of indentures and assignations, see sect. 5, sub-sect. 2, and *ante*, p. 31, note (g), and pp. 38-39.(z) *Ante*, p. 47-48.(a) See also sect. 15, and *ante*, pp. 68 and 71.(b) *Ante*, pp. 47-48.(c) See also sect. 15, and *ante*, pp. 69 and 71.

A.D. 1873 — to the keeping and subscription of the rolls directed to be kept by the two preceding sections, and such rules and directions shall be observed and obeyed by the several keepers of the said rolls.

The name of any person shall be struck off the said rolls:—

1. In obedience to the order of the Court, upon application duly made, and after hearing parties, or giving them an opportunity of being heard; (d)
2. Upon his own written application. (e)

Borrowing
process.

15. A Law Agent shall not be entitled to borrow a process depending before any supreme court sitting in Edinburgh unless he shall have a place of business in Edinburgh or Leith; and a Law Agent shall not be entitled to borrow a process depending before an inferior court unless he shall have a place of business within the jurisdiction of such court. (g)

No one to
practise
before a
Court unless
he has
subscribed
the roll of
Agents.

16. From and after the first day of February eighteen hundred and seventy-four no person shall be allowed to practise as an Agent in the Court of Session or any Sheriff Court until he shall have subscribed the roll of Agents practising before such Court, (h) or after his name shall have been struck off such roll, unless the same shall have been subsequently restored thereto. (i)

Provision as
to Sheriff
Court prac-
titioner
qualifying
for enrolling
as Agent in
the Court of
Session.

17. An enrolled Law Agent who has paid the stamp duty exigible by law on admission to practise as an Agent in a Sheriff Court shall be qualified to sign the roll of Agents practising in the Court of Session on paying the difference between such duty and the duty chargeable on admission to practise in the Court of Session. (k)

Enrolled
Law Agents
to be ad-
mitted as
Notaries
Public.

18. Any enrolled Law Agent may apply to the Court to be admitted a Notary Public, and it shall be lawful for the Court to admit him, and grant warrant to the keeper of the roll or register of Notaries Public to enrol him as a Notary Public on his paying the stamp duty for the time exigible by law from a Notary Public on admission, and after the passing of this Act it shall not be necessary for any person to find caution on his admission as a Notary Public. (l)

Societies
may admit
enrolled
Law Agents
to member-
ship.

19. Any Society of Law Agents may, notwithstanding any law,

(d) *Ante*, p. 357 *et seq.*

(e) *Ante*, p. 359.

(g) *Ante*, p. 71.

(h) See sects. 12 and 13, and *ante*, p. 67.

(i) See sects. 11 and 14, and *ante*, p. 357 *et seq.*

(k) *Ante*, pp. 67-69.

(l) *Ante*, p. 71-72.

statute, or usage hitherto in force, admit any enrolled Law Agent to be a member of it on such terms as it may see fit. *(m)* A.D. 1873

20. It shall be lawful for any Society of Law Agents to accept of an apprenticeship for five years served under the provisions of this Act with an enrolled Law Agent, although not a member of such Society, as a qualification for admission to such Society. *(n)* Of admission to membership of Law Societies.

21. Agreements between Law Agents acting for the same client to share fees or profits shall be lawful. *(o)* and a Law Agent authorised and acting for a client whom he discloses shall incur no liability to any other Law Agent employed by him, except such as he shall expressly undertake in writing. *(p)* Agreements between Agents as to sharing fees.

22. Every enrolled Law Agent shall be subject to the jurisdiction of the Court in any complaint which may be made against him for misconduct as a Law Agent, and it shall be lawful for the Court, in either Division thereof, to deal summarily with any such complaint and to do therein as shall be just. *(q)* Law agents to be subject to jurisdiction of the Court.

23. Nothing in this Act contained shall interfere with the obligation of any Law Agent to obtain a stamped certificate. *(r)* Act not to interfere with law as to certificates.

24. Any person, being a notary public, who has during the period of seven years immediately preceding the passing of this Act regularly taken out a stamped certificate as required by law, and who has during the said period been engaged in actual practice as a Law Agent or Conveyancer as well as a notary public, may at any time within one year after the passing of this Act be admitted as a Law Agent under this Act, if the court shall see fit, without making an affidavit of having served an apprenticeship as herein-before required, and without being subjected to examination. *(s)* The Court may, within one year after the passing of the Act, admit notaries public to be enrolled, if they see fit.

25. From and after the first day of February one thousand eight hundred and seventy-four, "The Procurators (Scotland) Act, 1865," shall be and the same is hereby repealed. *(t)* but such repeal shall not prevent societies which, prior to the passing of this Act, were formed under the said Act *(u)* from continuing to exist Repealing clause.

(m) *Ante*, pp. 23-24, and 392.

(n) *Ante*, pp. 23-24, and 392.

(o) *Ante*, pp. 389, and 390.

(p) *Ante*, pp. 147-9, 234-5, and

(q) See sect. 14, and *ante*, p. 357.

(r) See *ante*, p. 52 *et seq.*

(s) *Ante*, p. 47.

(t) Although the general repeal of the Procurators Act is fixed at 1st February 1874, such of its provisions as are inconsistent with those of the Law Agents Act which are not deferred till that date, are impliedly repealed from the date of the latter Act—viz., 5th August 1873.

(u) The names of these societies will be found *ante*, p. 19, note *(d)*.

as incorporated societies, and electing such office-bearers as they please,(x) and admitting members on such terms as they see fit;(y) provided always that it shall not be necessary for any agent admitted under this Act to become a member of any such society.(z)

Proviso as
to existing
powers of
inferior
courts.

26. Except in so far as relates to striking the name of any person off the roll of Law Agents,(a) nothing in this Act shall be held to affect the existing powers of inferior courts or the Judges thereof over procurators practising before such courts, so far as these powers may be necessary for supporting the jurisdiction and maintaining the authority of their several courts.(b)

II.—TABLES OF FEES.

I. TABLE OF FEES FOR THE PRACTITIONERS

BEFORE THE

COURT OF SESSION.

Prescribed by A. S. 19th December 1835, renewed by A. S. 15th May 1839, and made perpetual by A. S. 17th July 1841, as altered and amended by A. S. 7th July 1858, and A. S. 18th March 1870, together with the Scale of Charges allowed in Jury Causes by A. S. 10th July 1844.

By A. S. 18th March 1870, it is provided that there shall be exigible for time engaged in reference to judicial proceedings, where the practitioner shall take the option of charging by time:—

In Edinburgh, not exceeding half-an-hour, 6s. 8d.; above half-an-hour, and not exceeding an hour, 10s.; and for each half-hour, or part of a half-hour, thereafter, 5s.; but not exceeding for a whole day of eight hours, £4, 4s.

Out of Edinburgh, but in Scotland, the same rates of charge as in Edinburgh, besides personal and travelling expenses.

In London, or elsewhere out of Scotland, but in Great Britain, per day £5, 5s., besides expenses of journey, and £2, 2s. per day in

(x) *Ante*, p. 404.

(y) See also sects 19 and 20, and *ante*, p. 24.

(z) *Ante*, p. 23.

(a) Sects. 14 and 22, and *ante*, p. 357 *et seq.*

(b) *Ante*, p. 355 *et seq.*

London as personal expenses. In addition to time in London, a day is to be allowed for going, and another for returning.

For meetings and attendances for which the present authorised charge is 6s. 8d. per hour:—Not exceeding half-an-hour, 6s. 8d.; above half-an-hour, and not exceeding an hour, 10s.; and for every half-hour, or part thereof, after the first hour, 5s.; but not exceeding for a whole day, £4, 4s.

I.—*Bill-Chamber Proceedings.*

1. For drawing bills of suspension or interdict, or for loosing arrestment, also bills for commission for the examination of witnesses, answers to such bills, and notes or minutes to the Lord Ordinary, where necessary, 6s. for each sheet of 250 words. A.S. 19
Dec. 1835,
and 18
March 1870.

2. Lodging a bill of suspension, and inquiring for the interlocutor or deliverance thereon, and procuring certified copy thereof, or sist for intimation, 6s. 8d.

3. Instructing to intimate, 3s. 4d.

4. Returning certificate of intimation to Bill-Chamber, and getting up bill to expedite the letters, 3s. 4d.

5. In cases where it may be necessary to wait on the Clerks to the Bills, or on the Lord Ordinary, at *extra* hours, in order to procure a sist or interlocutor, or at a hearing before the Lord Ordinary, when such shall be ordered, for each hour, or part of an hour, so occupied, 6s. 8d.

6. Taking out bond of caution, returning the same when executed to the clerk, and intimating the lodgment to the opposite agent, 6s. 8d.

7. For getting up the bond to be attested, returning the attestation, when executed, to the clerk, and intimating the same, 3s. 4d.

8. For attendance inspecting the Bill-Chamber books, and entering appearance for the respondent in bills of suspension, 3s. 4d.

9. Ordering copy of the bill for the respondent, and procuring the same, 3s. 4d.

10. Lodging and intimating each paper or note to the Lord Ordinary, 3s. 4d.

11. Inspecting the books, and making inquiries whether answers have been lodged, 3s. 4d. This to be charged only once.

12. Inspecting books for Lord Ordinary's interlocutor, and taking copy thereof, 3s. 4d.

13. Taking out passed bill to expedite the letters, or ordering and procuring certificate of refusal, 3s. 4d.

14. Inspecting books and making inquiries whether caution has been found, and consenting or objecting thereto, 6s. 8d.

15. Ditto, as to each attestor, and consenting or objecting to him, 3s. 4d.

16. For ordering and taking out extract of decree for expenses, or commissions for taking the oaths of parties, 3s. 4d.

Ordering and procuring copies and certified copies of interlocutors and extracts, the same charge as in the Outer House.—(See *next head.*) A.S. 7 July
1858.

4. Attending the advising of the case in the summar or short roll, if the same shall not exceed two hours, £1; and if it shall exceed two hours, then for each additional half-hour, 5s.

5. The fees for attendances or consultations with counsel to be the same as those applicable to the Outer House procedure.—(See *preceding head*.)

6. For intimating each incidental petition, note, or minute requiring intimation by the regulations of Court, including certificate of intimation, 3s. 4d.; if intimated to more parties than one, then for each additional intimation, 1s.

7. For each intimation ordered on the walls or the minute-book, and writing certificate, 3s. 4d.

V.—*Proceedings in Jury Causes.*

The same charges shall be allowed in Jury Causes as in other causes in the Court of Session, with the following additions and variations:—

A.S. 7 July
1858, and
18 March
1870.

1. In respect a Jury Trial is generally attended with an extra degree of trouble, there shall continue to be allowed for the day of trial, if the trial shall not exceed four hours, £2, 2s.; exceeding four hours, and not exceeding six, £3, 3s.; and for each additional hour above six, 10s.

2. For perusing record, productions, and precognitions, &c., before trial, and preparing for same, from 13s. 4d. to £3, 3s., according to the time occupied and importance of the case.

3. A copy of the precognitions, for the use of the agent at the trial, to be allowed.

4. In addition to the same charge, as in ordinary Court of Session cases for notices of motions, there shall be allowed, after issues are adjusted, for each notice of motion lodged in process, and boxed to the presiding Judge, 3s. 4d.

The Act of Sederunt of 10th July 1844 provides:—

I. That no charge shall in future be allowed for journeys and attendances for taking precognitions of witnesses, but, in lieu thereof, a charge shall be allowed for taking instructions for precognitions of 13s. 4d., £1, 1s., £2, 2s., or £3, 3s., according to the circumstances of the case, and also charges for drawing the precognitions, according to length, at the same rate as is chargeable for drawing memorials and other papers, and that the said charges may be stated either in the form of a memorial to counsel for conducting the trial, or separately, as may be considered proper: Provided always, that the charges for drawing the precognitions shall be subject to the control of the Court, and that in case they shall contain irrelevant or unnecessary matter, they shall not be allowed by the auditor on the taxation of the account: And also, provided that in cases where it can be shown to the satisfaction of the auditor that it was indispensably necessary, or highly expedient,

that either the Edinburgh or country agent should go to a distance from their places of residence for the purpose of precognosing a witness or witnesses, reasonable charges shall be allowed for such journeys, and the expenses thereof; but in such cases no charge shall be allowed for drawing the precognitions of such witness or witnesses.

II. That the charges for copies of the memorial for the trial and precognitions, as well as for copies of any papers or documents which may be necessary for the instruction of counsel to conduct the trial, shall be stated in the account immediately before the fees to counsel for the consultation or trial; and that no charge for copies of papers or documents shall be allowed but such as are essentially necessary for the instruction of counsel: That is to say, if it is only a particular clause or clauses of a deed, or particular letters or papers on which the party relies, a charge shall only be allowed for copies of such clauses or letters, and not for copies of the whole deed or whole papers, if unnecessary at the trial: And it is hereby provided, that in such cases as there may be many papers or documents which are necessary for the instruction of counsel on both sides, or which it may be necessary or proper should be laid before the judges and jury, it may be competent for the parties to print the same at their mutual expense, so as to avoid the expense of copies.

III. That the charges for witnesses attending a trial shall not be stated either in the town or country agents' accounts, but in a separate schedule, to be appended to the account, and which schedule shall be in the form hereto annexed.

IV. That the allowances to be made to witnesses attending a trial shall be as follows:—

(1.) *When the Witnesses reside in the Town where the Trial takes place—*

Labourers, mechanics, servants, journeymen, &c., per day, from 5s. to 7s. 6d., according to circumstances.

Tradesmen, shopkeepers, innkeepers, clerks, farmers, &c., per day, from 10s. to 15s., according to circumstances.

Superior tradesmen, manufacturers, shopkeepers, auctioneers, &c., per day, from 10s. 6d. to £1, 1s.

Gentlemen, merchants, bankers, clergymen, &c., per day, £1, 1s.

Professional persons, such as writers or solicitors, accountants, physicians, surgeons, eminent architects, engineers, surveyors, &c., per day, £2, 2s.

Females, according to their station in life, per day, from 5s. to £1.

The above allowances being in full of all the above respective classes of persons shall be entitled to demand for

their trouble and maintenance, and no separate charges shall be allowed, for tavern expenses, or otherwise, in respect of witnesses.

(2.)—*Where the Witnesses do not reside in the Town where the Trial takes place.*

They shall be allowed at the above rates for the time necessarily occupied by them in going to, remaining at, and returning from the place of trial, besides reasonable travelling charges for going to and returning from the place of trial, according to their rank and station of life, and with reference to the means of conveyance to and from their respective places of residence, such as steam-boats, railways, &c. : Provided always, that the said allowances for travelling shall not exceed in whole the rate of sixpence per mile for going to, and the same for returning from, the place of trial ; and also provided that in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land-surveyors, or accountants, to make certain investigations previous to a trial, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons, shall be allowed as may be considered fair and reasonable : Provided that the judge who tries the cause shall, on a motion made to him, either at the trial or within eight days thereafter, if in session, or if in vacation within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance.

V. That receipts or vouchers for all the sums stated as paid to witnesses, shall be produced to the auditor at the taxation of the account, otherwise the same shall not be allowed.

VI. That the names of the witnesses who were examined at the trial shall be stated separately, as in the annexed schedule, from those that were not examined ; and if the expenses of all or any of the latter class of witnesses shall be demanded, the grounds or reasons for such demand shall be stated ; as, for example, that he was cited to prove a certain fact or writing which the opposite party had refused to admit before trial, but which his counsel admitted at the trial, whereby the examination of the witnesses was rendered unnecessary ; or (in the case of a defender) because the pursuer had failed to prove his case, in consequence of which the defender's witnesses were not examined ; but, in this latter case, it ought to be shown that all the witnesses charged for were properly and necessarily cited, the general rule laid down by the Court being, that the expense of witnesses who were not examined shall not be allowed, unless a good and valid reason shall be assigned for their non-examination.

VII. That the charges for messengers for executing summonses or citations of witnesses or havers, and returning an execution, shall be at the rate of 1s. 6d. per mile for travelling, and 1s. 6d. for each copy or citation, including all expenses of travelling, &c., or 2s. 6d. for each citation, if the defender, haver, or witness, resides in the same town as the messenger.

Form or Schedule referred to in the foregoing Regulations.

Witnesses' Names and Designations.	Distance from place of Trial.	Number of Days Absent, and rate per Day.	Total Sums paid.	Taxed off by the Auditor.
I. Witnesses Examined.			£ s. d.	£ s. d.
II. Witnesses not Examined.				

VI.—General Regulations.

1. FOR ENTERING APPEARANCE in a cause, either in the Inner or Outer House, revising the executions, writing *partibus*, and attending to all the necessary steps of form previous to the first enrolment, 13s. 4d.

2. FOR DRAWING PAPERS not requiring to be drawn by Counsel, and not being inventories of productions, 6s. for each sheet of 250 words.

For drawing an inventory of papers or productions—for the first sheet, 3s. 4d. ; each other sheet, 2s. 6d.

A.S. 18
March 1870.

Provided that each sheet shall consist of not less than 260 words; and also, that the memorials, or other information for the use of counsel, shall be confined, as closely as the case will permit, to statements of facts, without lengthened argument or long quotations from authorities; and that when, in the progress of a case, any additional memorial shall become necessary, the same shall not contain a repetition of the former statements, but reference shall be made thereto, as well as to proofs, deeds, writings, or correspondence produced, without the same being quoted at length; and if quotations exceeding one page each in length shall be made, the same shall be chargeable only at the rate of copying, instead of drawing a paper: Provided also, that the above fees for drawing papers shall include the agent's trouble in perusing papers, or receiving instructions to enable him to write the same.

All defences, condescendences and answers, revised condescendences and answers, and cases, shall be drawn and subscribed by counsel; and this rule shall likewise be applicable to all incidental petitions and complaints to the Inner House, or the Lord Ordinary on the Bills, and answers thereto, with exception of such petitions

as are merely formal, such as petitions for sequestration, or for the confirmation or discharge of a trustee, which, as well as reclaiming notes against the interlocutor of a Lord Ordinary, and notes to the Court, or a Lord Ordinary, may be drawn by an agent, although they must be signed by counsel as at present. These formal petitions, however, shall contain merely references to the clauses of the statute upon which they are founded, without quotation; and the allowance for a note in the Bill Chamber, or to have a cause put to the roll, or for a petition for a new Lord Ordinary, shall not exceed one sheet.

A.S. 18
March 1870.

3.—COPIES OF PAPERS.—Per sheet, of 250 words, if in English, 1s. 6d.; if in Latin, 2s. 6d.; ruled and figured, 2s.; or if folio size, 4s.

There shall be no allowance for an agent's copy of a memorial to counsel, nor for copies of any papers or productions in a process, except such as may be absolutely necessary for conducting it.

4. ATTENDANCES.—For each necessary attendance at a consultation of counsel, where a fee is paid without a memorial; for attending the auditor at the taxation of an account, or an accountant, surveyor, civil engineer, architect, tradesman, or other person to whom a remit shall be made by the Court, or at a proof, examination of parties or havers, visitation or inspection ordered by the Court; for making searches of any of the public records, or other like attendances, where the same shall be considered proper and necessary, or authorised by the Court, for each hour, or part of an hour, so employed, if in Edinburgh or its neighbourhood, 10s.

If an agent shall necessarily go to the country to attend a proof, the examination of parties, or other business, he is allowed for the time occupied in such business (including travelling), at the same rate, but see *ante*, p. 444, as to option allowed in charging.

Besides reasonable travelling charges, and an allowance for his maintenance, at a rate not exceeding £1, 1s. per day.

But when the business may be properly performed by an agent in the country, the auditor, in taxing an account, shall only allow such expenses as would have been incurred if it had been done by a country agent.

Attendance on a commissioner fixing diet of proof, or examination of parties or havers, and intimating the same to the opposite agent or party, and writing certificate of intimation, 6s. 8d.

Procuring deliverance on any summary application in time of vacation, or during any recess of the court, 6s. 8d.

Attendance directing clerk to search for process asleep, 3s. 4d.

Examining papers lodged by opposite party, and ascertaining new matter, and to what extent additional information may be required, where no memorial is prepared in consequence, the same fee as allowed for revising papers drawn by counsel, according to their length.—*See above.*

A.S. 9 July
1853.

Perusing and considering reports obtained under remit, or productions made or recovered under a diligence, whether copies be afterwards made or not, where no memorial is prepared in consequence, to be charged according to time occupied.

Attendance on reporter with proceedings, &c., and getting him to accept remit, 6s. 8d.

Attendance on reporter, getting up his report, and settling his fee, 6s. 8d.

Attendance on commissioner under commission and diligence, and getting up his report, with productions, &c., and paying his fee, 6s. 8d.

Writing commissions or diligences against witnesses or havers, and other similar writings, and duplicates thereof, when necessary—first sheet, 6s. ; every other, 4s.

Preparing for hearing or advising in Inner House, and for debates in debate-roll in Outer House, where no memorial is prepared at the stage of the cause, 13s. 4d.

For examining reclaiming note and appendix of opposite party, to ascertain correctness thereof, 6s. 8d.

For each day in which a case stands in the Inner House rolls, though not called, 6s. 8d.

Drawing note to extractor for extract, lodging same, transmitting process, and procuring extract, 6s. 8d.

Inquiries if paper of opposite party lodged, 3s. 4d. But this to be charged only once as to each paper.

Attending consultation with counsel at chambers at any important stage of a cause, where no memorial is charged, not exceeding half-an-hour, 6s. 8d. ; above half-an-hour, and not exceeding an hour, 10s., over and above the charges for attendance with papers and fee, and fixing the consultation.

Procuring copy of an interlocutor, and booking the same, 3s. 4d.

Note.—The above fee to apply only to important interlocutors in a cause, and of which it may be necessary to keep a copy. A.S. 17

Lodging each paper, and productions made therewith, 3s. 4d. ; July 1841. or if productions are lodged separately, and when they should not have been lodged with the paper, the same fee.

Borrowing a process consisting of not more than 40 numbers, 2s. ; above 40 and not exceeding 100, 3s. ; above 100 and not exceeding 200, 4s. ; and for every 100 or part of 100 above 200 numbers, 1s. But if only part of a process is borrowed, *ex gr.*, an interest in a process of multipointing or ranking and sale, the charge to be according to the number of articles borrowed.

Returning a process, and getting receipt scored, one-half of the above fees.

Attendance getting a process transmitted from one clerk to another, 3s. 4d.

Ordering a caption for the return of a process, and intimating same to opposite agent, 3s. 4d.

If the process is not returned after intimation by the clerk, procuring caption, intimating the same, and instructing macer or messenger to execute, 3s. 4d.

When the caption is enforced, the above fees to be paid by the party against whom it is directed, with the clerk and macer's fees; the several fees to be paid being printed or marked on the back of the caption.

Getting an account of expenses marked at fee-fund, lodging the same with the auditor, getting warrant to tax, and serving the same, with copy of the account, on opposite agent, 3s. 4d.

Attending the auditor at taxing an account of decree in absence, 3s. 4d.

Ordering and procuring extract of any act or warrant, commission, diligence, or decree, or procuring authentication of an interlocutor, or order of Court, where such is necessary, 3s. 4d.

Instructing messenger to execute or intimate the various kinds of writs, when necessary, 3s. 4d.

A.S. 18
March 1870.

5. CORRESPONDENCE.—For writing each necessary letter, including booking, not exceeding one page of 125 words, 3s. 4d.; exceeding one page, but not exceeding two pages, 5s.; and for each page, or part of a page beyond the first two pages, 2s. 6d. But mere formal letters (such as simply transmitting copies of papers), to be charged each 1s. For telegrams the same rate of charge as for letters.

And where the letter necessarily enters into detail, and exceeds one sheet, then for every other sheet, or part thereof, including booking, 3s. 4d.

Circular Letters.—The above rates for the first, and the others to be charged as copies, according to the length, provided the expense of such circulars shall not exceed the expense of printing the same.

But no letters shall be allowed except such as are essentially necessary for conducting a cause, or communicating information as to important interlocutors or steps of procedure.

The agent's letter-book shall be produced to the auditor, if required, to show the length or propriety of the letters stated in an account, and no letter shall be allowed which is not fully booked.

VII.—*General Rules prescribed by A. S. 19 Dec. 1835, in regard to the Taxation of Accounts for Judicial Proceedings.*

All the foregoing regulations shall be held as applicable to the taxation of accounts, as well between party and party as between agent and client; but, in order that the expense of litigation may be kept within proper and reasonable bounds, it is hereby declared, that in taxing accounts, between *party and party*, only such expenses shall be allowed as are absolutely necessary for conducting it in a proper manner, with due regard to economy; *ex. gr.*, if a party shall think proper to employ an unnecessary number of counsel, or to pay

higher fees than are warranted by ordinary practice, the *extra* expense thereby occasioned shall not be allowed against the losing party.

And it is hereby declared, that notwithstanding a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.

In all cases where memorials are laid before counsel, the fee paid therewith, together with the date of payment, shall be marked on the back in large legible characters (in words), and the paper shall be afterwards got back from the counsel with his signature or initials endorsed thereon, which shall be produced to the auditor at the taxation of the account as the voucher of the fee stated for counsel, otherwise neither the charge for the memorial nor fee shall be allowed. In cases where fees are paid to counsel without a memorial, a certificate under the hand of the counsel or his clerk shall, if required, be produced that such fees were actually and *bona fide* paid of the dates stated in the account; nor shall party upon any account be allowed to pay or state higher or additional fees to counsel, after he has been found entitled to expenses, than were actually paid at the time. But this rule shall not apply either to cases on the poor's roll, or to such as have been conducted gratuitously by the agent and counsel on account of the poverty of the party.

In such cases where it may be necessary or proper to employ a country agent in conducting a cause in the Court of Session, reasonable charges may be allowed for his trouble, correspondence, and agency, according to the rules and practice that have hitherto prevailed and been sanctioned by the Court: Provided always, that double charges shall not be thereby incurred for doing the same business; *ex. gr.*, if a charge for a memorial to counsel, at any particular stage of a cause, is allowed to the agent in the Court of Session, a charge for a memorial to instruct the agent shall not also be allowed in the account of the country agent; or if a charge for a memorial is allowed in the country agent's account, a similar charge shall not at the same time be allowed to the agent in this Court, but only a reasonable charge for perusing, considering, and laying the same before counsel.

It is understood that the agent is not, without special agreement, to be held personally responsible to an accountant, engineer, or other reporter, to whom a remit may be made by the Court on matters of fact in a depending process, where the agent has authority to bind the party.

II.—FEE FUND DUES.

INNER HOUSE AND COURT OF TEINDS.

Original petitions, and petitions and complaints, or any other writ or step by which a cause is originated; also answers thereto, or other first step for a respondent or other party, each paper printed, 15s.; written, 12s. 6d.

Condescendences, answers, and revised or amended condescendences and answers, with or without pleas in law annexed, each paper, printed, 10s.; written, 7s. 6d.

Cases, and revised or supplementary cases, each, printed, 10s.; written, 7s. 6d.

Reclaiming notes, with or without appendices, also petitions and answers, not being first steps, each, printed, 10s.; written, 7s. 6d.

Notes to the Lord President and answers thereto, minutes and answers thereto, each, printed, 5s.; written, 2s. 6d.

Notes of additional or supplementary pleas in law, 7s. 6d.

Each other step or pleading in the Inner House not enumerated in this schedule, printed, 10s.; written, 7s. 6d.

OUTER HOUSE.

Summonses of every kind, and defences thereto; also letters or notes of suspension or advocacy, and any other writ, pleading, or step whereby a cause is originated, or by which a party first makes appearance in any cause, each, 10s.

Reasons, or revised or amended reasons, of suspension or advocacy, and answers, or revised and amended answers thereto, with or without notes of pleas in law annexed, each, 5s.

Condescendence and answers, revised or amended condescendence, and revised or amended answers, with or without notes of pleas in law annexed, each, 5s.

Notes of additional or supplementary pleas in law, 5s.

Inventories to satisfy production, and inventories of titles in teind causes, each, 5s.

Cases, and revised or supplementary cases, 7s. 6d.

Minutes and answers thereto, notes and answers thereto, each, 2s. 6d.

Objections, revised objections, answers, and revised answers thereto, each, 2s. 6d.

Condescendence and claims, or interests in multiplepointings, rankings, &c., and revised ditto, where the sum claimed is upwards of £10, each, 2s. 6d.

(No charge where for £10 or under.)

Each other step or pleading in the Outer House not here enumerated, 7s. 6d.

BILL-CHAMBER.

Bills or notes of suspension or advocacy, suspension and interdict, and answers thereto, or other original application or first step, except plack bills, each, 5s.

Bills for loosing arrestments and answers thereto, notes and answers thereto, each, 2s. 6d.

Accounts of expenses, each (See "Miscellaneous Papers,") 2s. 6d.

Bonds of caution on being taken out, 2s. 6d.

Certificates or extracts of judgment, 2s. 6d.

EXTRACTS.

Decrees of locality, 40s.

Decrees of valuation, 40s.

All other decrees, if *in foro*, 15s.

Decrees in absence, acts, abbreviates of adjudication, diligences, and protestations, each, 10s. 6d.

MISCELLANEOUS PAPERS.

Certified copy of proceedings for appeal to the House of Lords, 40s.

Certified copy of pleadings or interlocutors by a principal clerk or his assistant, 2s. 6d.

Oaths of parties, witnesses, or havers, if in presence of a Lord Ordinary or the Inner House, each, 2s. 6d.; if on commission, 1s.

Bonds of judicial caution, on being taken out, 10s.

Prepared states and schemes, printed, 15s.; written, 10s.

Memorials and abstracts, 10s.

Minutes of election of a common agent, 2s. 6d.

For printed additional appendices or other papers, boxed for the Judges of the Inner House, not being pleadings in the cause, each, 2s. 6d.

Notes for searches, if under ten years from the date of the order, each search, 2s. 6d.; ten years and under twenty-five, 7s. 6d.; twenty-five years and upwards, 12s. 6d.; for extracted processes in the teind record, 5s.

Accounts of expenses, 5s.

For Auditor's Fees of Taxing.

	s.	d.
Accounts under £10,	2	6
10 and under £20,	5	0
20 " 50	7	6
50 " 100	10	0
100 " 150	15	0
150 " 200	20	0
200 " 300	30	0
300 " 500	40	0
500 " 600	60	0

And for accounts exceeding £600, the fee to be increased at the rate of 5s. for every £100, or part of £100.

The foregoing fees apply to all causes and proceedings in the Court of Session and Court of Commissioners for Teinds, and also to jury causes; but not to maritime or consistorial causes, nor to applicants for the benefit of the poor's roll, or persons pursuing or defending in *forma pauperis*, nor to any proceedings which, at the date of the Act here referred to, were exempt from fees by any Act of Parliament then in force.

IN MERCANTILE SEQUESTRATIONS.

Original petitions for sequestration, or any other writ or step by which a process of sequestration is originated, 10s.

All other papers, being steps of procedure, and not productions, each, 2s. 6d.

PAYMENT BY STAMPS.

Under the provisions of "The Courts of Law Fees (Scotland) Act, 1868" (31 and 32 Vict. c. 55), the Commissioners of Her Majesty's Treasury, with concurrence of the Court of Session, have made the following rules, which came into operation on 1st May 1873, for regulating the use of stamps in the payment of fees in the offices of the Court of Session, Court of Teinds, and Court of Justiciary, or to the officers thereof:—

1. The stamps to be used in payment of the fees payable in the offices or to the officers aforesaid shall be adhesive stamps.

2. Such stamps shall be affixed, at the expense of the parties liable to pay the fees, on or to the paper, vellum, or parchment on which the proceedings in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceedings.

3. Where any of such fees are payable in respect of any step of process, or any matter or thing to be done by any of the officers, or in any of the offices aforesaid, and it shall not have been customary to use any written or printed document or paper in reference to such step of process or matter or thing whereon the stamp could be stamped or affixed, the party or his agent desiring to proceed in such process, or requiring such matter or thing to be done or permitted to be done, shall make application by a short note or memorandum in writing or print, and a stamp denoting the amount of the fee so payable shall be stamped or affixed to such note.

4. Every officer who shall receive any document to which a stamp shall have been affixed pursuant to these rules, shall immediately on receipt of such document cancel the stamp or stamps thereon, by obliterating the same by means of a hand stamp and printing ink showing the date of the cancellation, or by writing thereon the initial letters of the name of the officer or clerk by

whom the same is hereby directed to be cancelled, and the date of such cancellation; and all adhesive stamps affixed to any paper or document presented to or kept in the possession of any of the officers of the aforesaid courts or of the clerks of the judges, shall, before the act is done, or permitted to be done in respect of which the fee denoted by such stamp is payable, be effectually cancelled by some officer of the said courts, or by one of the said clerks of the judges in the manner aforesaid; and no such paper or document shall be marked by the clerk of process or delivered out until the stamp thereon shall have been so cancelled or defaced; and it shall be the duty of all officers of court before whom the proceedings to which such stamps ought to be affixed, as well as the agents in the proceedings, to see that the proper stamps are affixed and cancelled.

5. When through mistake the stamp upon any paper or document has been cancelled as aforesaid without having been legitimately used, it shall be competent to the Board of Inland Revenue, upon the presentation of a certificate by the Queen's and Lord Treasurer's Remembrancer, that such stamp, also produced, is a fit subject for allowance, to allow the duty thereof.

6. The several officers by whom stamps may be cancelled as aforesaid shall, on or before the 30th day of April in each year, make out an account of all stamps cancelled in their respective offices, and shall render such account to the Queen's and Lord Treasurer's Remembrancer for transmission to the Lords Commissioners of Her Majesty's Treasury; and the first of these accounts shall be for the year ending 31st March 1874, and so forth.

7. Any person appointed by the Lords Commissioners of Her Majesty's Treasury or the Board of Inland Revenue for that purpose, shall have power and be permitted to inspect the papers in any proceedings in the foresaid courts or the offices thereof, in order to ascertain that stamps have been duly affixed and cancelled.

8. The Board of Inland Revenue may authorise distributors of stamps, and persons authorised to sell stamps in Scotland, to sell the stamps above referred to.

(*Note*.—Fee stamps may be purchased at the General Register House, and at the Inland Revenue Office. See *Edinburgh Gazette*, 25 March 1873.)

III.—FEES PAYABLE UNDER THE BANKRUPTCY ACT OF 1856.

IN THE COURT OF SESSION.

To the Keeper of the General Minute-Book.

For entering the first deliverance, and deliverance awarding sequestration, adjudication, and discharge, and approval of composition, each, 2s. 6d.

For entering any other deliverance or intimation, 1s.

To the Extractors.

For every extract made of the proceedings or of the deliverance of the Lord Ordinary or Inner House, per sheet, 1s.

To the Keepers of the Records.

For entering any schedule, 1s.

For entering on the margin of any record the recall of sequestration or discharge in favour of the bankrupt, 1s.

For access to, and liberty to make excerpts of, proceedings under this Act from any register or record appointed by the Act to be kept, or in which entries are therein appointed to be made, a fee of 1s., for each year of the record inspected, but not exceeding in all for any one record, 10s.

For extracts or certified copies therefrom, per sheet, 1s.

For collating and certifying extracts therefrom, per sheet, 6d.

SHERIFF COURT.

To the Sheriff-Clerk.

On every deliverance pronounced by the Sheriff, awarding sequestration, declaring the election of a trustee, appointing diets of examination, granting a discharge to the bankrupt, approving of composition, or exonerating the trustee, 2s. 6d.

For every other deliverance, not being merely an order for papers or revisals, 1s.

For every transmission to or by him of the proceedings, 1s.

For entering the first deliverance, and the deliverance awarding sequestration, in the register, each (if separate), 6d.

For entering the name and designation of the trustee and commissioners in the register, 6d.

For issuing, receiving back, and examining bond of caution for trustee, to be paid at the issuing of bond, 2s. 6d.

For oath of the bankrupt, and examinations of him or others, per sheet, 1s.

For every warrant of apprehension or citation of the bankrupt or others, or commission to take examination, 2s. 6d.

For every certified copy or extract of the proceedings before the sheriff, or of any deliverance pronounced by him, per sheet, 1s.

For every annual report of the depending sequestrations, for each sequestration, to be paid by the trustee, 6d.

For every borrowing of all or any part of the proceedings, 6d.

To the Sheriff.

Attending any meeting of creditors or examination, for each such meeting or diet of examination, not being on the same day, £1, 1s.

PRICES FOR ADVERTISEMENTS IN THE LONDON AND EDINBURGH GAZETTE.

For six lines and under, 6s.

For more than six lines, and not exceeding ten lines, 7s. 6d.

For more than ten lines, and not exceeding fifteen lines, 10s. 6d.

For more than fifteen lines, and not exceeding twenty lines, 14s. 6d.

For more than twenty lines, and not exceeding twenty-five lines, 17s. 6d.

For more than twenty-five lines, and not more than thirty lines, 20s. 6d.

Sec. 183 of Bankruptcy Act prohibits higher charges being made than those specified in the above Table.

IV.—CHANCERY AND SHERIFF CLERKS' FEES IN SERVICES.

(1.) *Office of Chancery.*

For extracting decrees of service (including recording), each sheet of extract, or part of a sheet, of 300 words, 2s.

For certified copies of proceedings in services, when required by the party, each sheet, or part of a sheet, of 300 words, 2s.

For inspection of each book of record, having a corresponding index of reference, 2s. 6d.

For inspection of the proceedings in a service, 2s. 6d.

For searches in the indices in the books of record—For any period not exceeding one year, a fee of 2s. 6d. ; for any period from one year to ten years inclusive, a fee of 5s. ; for any longer period, 10s.

For transmitting the proceedings in a service on the warrant of the Court of Session, 7s. 6d.

For each attendance to exhibit a book or books of record where the same may be lawfully required, a fee of 5s.

(2.) *To the Sheriff-Clerk of Chancery and Sheriff-Clerks of Counties.*

Fee to be received on presenting the petition, whether of general or special service, whereof one-half to be retained by the sheriff-clerk receiving it, and the other half accounted for by him to the sheriff-clerk who assists in the publication of the petition, and to cover correspondence, framing of abstracts, publication, and post-ages, 10s.

In General Services.

For attending at service, and framing and recording minutes, 3s. 6d.

In litigated cases, the clerk or assistant clerk to be paid for writing the proof, at the rate, per sheet of 300 words, of 6d.

For general trouble connected with the service, 10s.

For writing decree of service, 2s. 6d.

In Special Services.

For framing and recording minutes (including attendance at the service)—For the first sheet of 300 words, 3s. 6d. ; every following sheet, 2s.

For general trouble connected with the service, 15s.

For writing decree of service, 5s.

In litigated cases, the clerk or assistant clerk to be paid for writing the proof at the rate, per sheet of 300 words, of 6d.

Note.—In all cases the additional procedure occurring when the service is opposed to be paid for by the parties, according to the rates chargeable by the respective sheriff-clerks in ordinary business ; and in the case of the sheriff-clerk of Chancery, according to the rates chargeable by the sheriff-clerk of Edinburgh, as regulated by the Act 1st and 2d Vict. cap. 119.

Caveats.

For each caveat (to be effectual for one year), the sheriff-clerk to receive for his own use, in all cases, 2s. 6d.

V.—COMMISSARY CLERKS' FEES.

In applications for appointments of executors-dative, and other procedure, under the Act 21 and 22 Victoria, c. 56.

For receiving, examining, and marking each petition for the appointment of an executor-dative, affixing copies thereof, framing and transmitting, free of charge, the abstract thereof to the keeper of the record of edictal citations, receiving and examining abstract published by said keeper, writing the certificate of intimation on the principal petition, including fee on the decree-dative, 10s.

And, in addition, when a second petition is presented, besides the above fees on such second petition, if the clerk shall be directed to intimate the same, for such intimation, 2s. 6d.

Inventories, confirmations, and other official business :—

For receiving and examining inventories, with relative oath, and for receiving and examining testamentary writings, containing appointment of executors and relative inventory and oath—

When the amount of the inventory is under £100,	£0	2	6
£100 and under	200,	0	3 6
200 ...	300,	0	5 0
300 ...	500,	0	7 0
500 ...	700,	0	8 0
700 ...	1,000,	0	10 0
1,000 ...	3,000,	0	12 6
3,000 ...	5,000,	0	15 0
5,000 ...	10,000,	1	0 0
10,000 ...	20,000,	1	10 0
20,000 ...	40,000,	2	0 0
40,000 and upwards,	.	3	0 0

For expediting confirmations—Testaments-dative, for all the duties (besides the charge for writings, see below), 3s.

Eiks thereto at same rate.

Testaments-testamentar—

When the amount of the inventory is under £50,		£0	1	0
£50 and under		100,	0	2 6
100	...	200,	0	4 0
200	...	300,	0	5 0
300	...	500,	0	7 0
500	...	1,000,	0	10 0
1,000	...	2,000,	0	12 6
2,000	...	3,000,	0	15 0
3,000	...	4,000,	1	0 0
4,000	...	5,000,	1	5 0
5,000	...	10,000,	1	10 0
10,000	...	20,000,	2	0 0
20,000	...	40,000,	4	0 0
40,000 and upwards,		.	5	0 0

Eiks to testaments-testamentar at same rates.

For making out and receiving bonds of caution—When the caution is under £200, 5s.; £200 and under £500, 7s. 6d.; £500 and upwards, 10s.

For restriction of caution, including the deliverance, and receiving and marking productions, 2s. 6d.

For writing, viz.—For recording testaments, inventories, and all other matters required to be recorded; for extracts and copies from records, extracts of inventories or testaments, including certificate on certified copies, and generally for all writings, per sheet of writing or printing, 1s. 6d.

Note.—Every sheet to contain 250 words; one sheet to be charged when the whole writing does not exceed 250 words, and if there be any remaining number of words after calculating the number of sheets of 250 words each, such remainder to be charged as an additional sheet.

To the Commissary Clerk of Edinburgh—For collation of English and Irish probates, or letters of administration, per sheet of 250 words, 2d. For entering abstracts of such probates, or letters of administration, in the commissary books, and granting certificate, in form of Schedule (F) annexed to the Act, 10s.

For furnishing materials for and appending the seal of court to confirmations and other writs, 1s.

Attendance at sealing repositories or other similar business (exclusive of the fee for marking the petition), per hour, 6s. 8d.

For Searches—For giving inspection of any of the records of Court, and in Edinburgh, of any copy probate lodged with the clerk, each case, when not exceeding five years back, 1s.; if beyond five years, 2s. 6d. For searching for a process or any particular document, when the search is made by the clerk, including certificate of search, when required—if beyond one year and not exceeding five, 2s. 6d.; five years and upwards, 5s.

For certificates of registration of testamentary and other documents, 2s. 6d.

For each caveat, 2s. 6d.

JUDICIAL BUSINESS:—For receiving, and marking, and calling every summons or original petition, other than those under Branch 1st, 1s.

For every defence, answer, and reply, 1s.

For receiving and marking each set of productions, except the first, 6d.

For each deposition of a witness, including attendance at proofs, 9d.

For lending or receiving back process, and comparing the same with the inventory, and scoring the receipt, 6d.

For diligence to cite witnesses, writing included, 1s.

For second do. do., 1s. 6d.

For arrestments, and loosing of do., each, 1s.

For caption to compel production of process, 6d.

For marking intimation of sists on bills of advocacy, and sisting procedure, 2s. 6d.

For each deliverance or decree, except those under Branch 1st, and for restriction of caution, 2s. 6d.

For edicts of curatory, 1s.

For an act of curatory, per sheet, 1s.

For extracts (judicial), per sheet, 1s.

VI.—FEES FOR THE OFFICE OF GENERAL RECORD.

As regulated by the Commissioners appointed by Act 3, Geo. IV., Cap. 62.

INSPECTION OF BOOKS OF RECORD AND OF THEIR ORIGINALS OR WARRANTS.

For the inspection of each book of record to which there is no proper minute-book or index of reference, there shall be charged a fee of 1s.

For the inspection of each book of record, to which there is a corresponding minute-book or index of reference, 2s. 6d.

For inspection of every original instrument, deed, or warrant preserved or recorded in the General Register House, 7s. 6d.

INSPECTION OF MINUTE-BOOKS AND INDEXES OF PUBLIC RECORDS.

For searches in the minute-books or indexes of each class of the public records, there shall be charged the following fees for each and every such search—viz., For any period under one year, a fee of 2s. 6d. For any period extending from one year to ten years

inclusive, a fee of 5s. For any period extending from eleven to forty years inclusive, a fee of 10s. For any periods exceeding forty years, a further fee at the same rate as the preceding.

For inspection of the printed chronological abridgment of the Registers of Seisins, General and Particular, subdivided into county arrangement, there shall be charged the following fees—viz., For any period, if not more than one year, a fee of 5s. For any period extending from one year to ten years inclusive, a fee of 10s. For any period extending from eleven to forty years inclusive, a fee of 20s. For periods exceeding forty years, a further fee at the same rate as the preceding.

For inspection of the alphabetical indexes of the Register of Abbreviates of Adjudication, or of the Registers of Inhibition, General and Particular, each a fee of 10s.

EXHIBITION AND TRANSMISSION OF REGISTERS, OR OF ORIGINAL DEEDS AND WARRANTS.

For every original deed or warrant transmitted or given up in pursuance of the Acts and orders of the Lords of Council and Session, there shall be charged a fee of 10s. 6d.

For any book of record that shall be exhibited in any of the Supreme Courts of the kingdom, or in courts for the service of heirs, 10s. 6d.

EXTRACTS, AND CERTIFIED COPIES.

For extracts or certified official copies from the records of Parliament, Privy Council, or Exchequer, or from the original warrants of those several records, there shall be charged, per sheet of 300 words, or under, as the case may be, a fee of 10s.

For extracts or certified official copies from the register of the Great Seal, the register of the Privy Seal, the register of Signatures, the register of Decreets of the Court of Session, the register of Abbreviates of Adjudication, the register of Tailzies, and the register of Deeds in the books of Council and Session, or any other registers not here specified, or from the warrants of any of those several registers, there shall be charged, per sheet of 300 words, or under, as the case may be, a fee of 5s.

N.B.—These fees are exclusive of stamp-duties and fees of writing. But the former customary fee of 5s. for the record shall not be charged.

EXCERPTS.

For excerpts or copies from any register or document, whether complete or partial, and not certified, there shall be charged, in addition to the fee for the inspection of the record or warrant, a fee at the rate of 6d. per sheet of 400 words.

MARKING OF BOOKS OF RECORD.

For every book duly marked and issued to the keepers of public

ordered by the Sheriff for adjusting the record, or for any other purpose, and the other is absent, or not prepared to proceed, the Sheriff shall have power to decern against the opposite party for payment of the fee for attendance to the procurator who is ready. And when no notice has been sent of the withdrawal of an appeal at least two lawful days before the date fixed by the Sheriff for an oral hearing, two-thirds of the fee for the debate will be allowed to the respondent's agent.

VIII. Procedure in removings and ejections to be charged by the amount of rent. Where the amount of rent is not set forth in the summons, or is not set forth as exceeding £25, the charges shall be according to Scale I.

IX. In actions *ad factum præstandum*, for exoneration, and others where the pecuniary amount or value of the matter in question cannot be measured or ascertained from the process, the charges shall be according to Scale II., unless it shall appear to the Sheriff proper in the circumstances to direct otherwise.

X. In actions where there are more defenders than one pursued for different debts, or summoned to remove from different premises, full charges for writings will be allowed for the highest of the rents or sums charged for,—one-fourth only of the ordinary fees will be allowed on each of the other rents or sums,—and the whole amount will be apportioned among the different defenders, according to the debts for which they are respectively sued, or the rents of the premises from which they are respectively summoned to remove. But in such cases the procurator will be allowed to charge one-half only of the fees under Art. 12 of the Table against each defender, according as the amount of his debt, or the rent of the subject from which he is summoned to remove, falls under Scale I., II., or III.

XI. The principal interlocutor sheets shall not be given out to parties; a certified copy thereof shall be made up by the Clerk from time to time, and put in process, for which he shall be allowed to make a charge at the end of the process for the total number of sheets contained therein, according to Art. 6 of the Table, to be paid by the party found liable in expenses, or, where no expenses are found due, by the parties equally.

XII. Every sheet of two pages shall contain 250 words; but if the whole writing does not extend to 250 words, the fee for a sheet is, notwithstanding, to be chargeable for such writing; and if, after finding the number of sheets which any writing shall comprise, calculated at the above rate, any number of words less than 250 shall remain, such fewer number of words shall be charged as a sheet.

XIII. Auditors shall not allow charges for payments to officers, or other outlay, unless vouchers be produced.

XIV. No other or higher fee shall be allowed than those hereby authorised ; and the rates of charge in the subjoined Table shall be held as applicable to the taxation of accounts, as well between agent and client as between party and party.

DUN. McNEILL, I.P.D.

TABLE OF FEES.

FOR BUSINESS IN THE SHERIFF COURT.

	SCALE I.	SCALE II.	SCALE III.
	£ s. d.	£ s. d.	£ s. d.
1. Drawing Summons, Petition, or other Writing, by which any process or application is first brought before the Court, whatever be the length thereof,	0 15 0	1 0 0	1 10 0
2. Drawing Condescendence and Defences— <i>per sheet</i> ,	0 4 0	0 5 0	0 6 0
3. Drawing Tutorial and Curatorial Inventories, or Inventories in processes of <i>Cessio Bonorum</i> , Juratory Caution, or Confirmations of Executry— <i>per sheet</i> ,	0 4 0	0 5 0	0 6 0
4. Revising Condescendences and Defences, — <i>per sheet</i> of original paper and additions,	0 1 6	0 2 6	0 3 0
5. Drawing papers of any other description, including Reclaiming Petitions on Appeals, and for all necessary Schedules of Intimation, Requisition, and Protest, Precepts of Arrestment, or Diligence against Witnesses or Havers— <i>per sheet</i> ,	0 3 0	0 4 0	0 5 0
<i>Notes.</i> —Where a paper necessarily exceeds 20 sheets, each sheet above 20 to be charged,	0 2 0	0 3 0	0 4 0
6. For all necessary Copies— <i>per sheet</i> , including Copies of Proof when ordered for the use of the Sheriff on Appeal,	0 1 0	0 1 0	0 1 0
7. For making up Accounts of Expenses for Taxation, and also necessary Copies of States, Copies of Accounts of Expenses, to be furnished to the other party, and Notarial Copies— <i>per sheet</i> ,	0 1 6	0 1 6	0 1 6
8. For Inventories of Productions, lodged with any Pleading or Application, not exceeding 10 numbers,	0 1 0	0 1 6	0 2 0
And for each additional 10 numbers,	0 1 0	0 1 6	0 2 0
9. For each necessary Letter, exclusive of Letters intimating Enrolments, Interlocutors, or steps taken where an At-			

	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
tendance Fee is allowed, also those excluded by General Regulation No. V., <i>Note.</i> — Letters intimating adjourned Diets of Proof not to be chargeable.	0 2 0	0 2 6	0 3 4
<i>Attendances.</i>			
10. (a.) At the Meeting under § 3 of the Statute to explain the grounds of Action and Defence to the Pursuer's Agent,	0 5 0	0 7 6	0 10 0
(b.) If a full record be ordered to be made up, the Defender's Agent will at this stage be allowed,	0 10 0	0 15 0	1 0 0
(c.) But if the Record be closed on a Minute at this or at an Adjourned Meeting, the Pursuer's Agent will be allowed, instead of (a) supra, And the Defender's Agent will be allowed, instead of (b) supra,	0 7 0 0 15 0	0 10 0 1 2 6	0 12 0 1 10 0
<i>Note.</i> —These Fees to be in full of all charges for attendances (however numerous), and hearings, and preliminary or incidental discussions in the matter of closing the Record by way of minutes and writings relative thereto, unless the Sheriff shall by a special Interlocutor order a debate.			
11. At the Meeting with the Sheriff, under § 4 of the Act (including all adjournments) and Meetings for revisal or otherwise, for adjusting and closing the Record on Condescendence and Defences, or Revised Condescendence and Defences,	0 10 0	0 15 0	1 0 0
<i>Note.</i> —This Fee is to include all the attendances, however numerous, up to the closing of the Record, and to cover all discussions on dilatory Defences, &c., except (1st) when the Sheriff orders a separate Record on dilatory Defences to be made up (as in Regulation VI.); or (2d) when the Sheriff by a special order appoints a full debate on such points.			
12. At pronouncing or reporting any Interlocutor (except Interlocutors closing the Record, or in the course of proofs, or fixing diets, disposing of motions for prorogations, making avizandum, ordering attendance, or lodgment of			

	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
papers or debates), including intimation to Client and opposite party of the business done at the meeting for which it is charged. See Regulation V.,	0 2 6	0 3 6	0 4 6
13. By previous order of the Sheriff to explain any point, or to receive instructions, or the like, not coming under the description of "Debates" <i>not</i> by the hour, and including attendance at pronouncing the Interlocutor,	0 4 0	0 5 0	0 6 0
14. At Debates under §§ 5, 12, 16, and 23, of the Act 16 and 17 Vict. cap. 80, also at Debates specially ordered by Interlocutors of the Sheriff (See Reg. V.),	1 0 0	1 10 0	2 0 0
<i>Note.</i> —When the employment of Counsel is sanctioned (See No. 23) the Procurators in attendance will only be allowed the Fees in No. 10 (a.)			
15. In Bankruptcy proceedings :— At Examination of Bankrupt or others under the Statute— <i>for each hour,</i>	0 6 8	0 6 8	0 6 8
16. At Proofs and Precognitions :— (a.) Proofs :— For each hour occupied at Proofs, Depositions, Declarations, Examinations, or Judicial Inspections, or before Reporters or Judicial Referees,	0 4 0	0 5 6	0 6 8
<i>Note 1.</i> —No Fees to be allowed in respect of Debates or Discussions, oral or written, during Diets of Proof, or deliverances thereon.			
2. When a Proof is necessarily taken by a Commissioner, his Fee to be the same as that of an Agent (except Precognition Fees), and his Clerk will be allowed 6d. a sheet for writing.			
3. The Sheriff shall, especially when Proofs are prorogated and protracted, disallow the time occupied superfluously or unnecessarily.			
(b.) Precognitions :— For each Witness actually examined at the Proof, or whose examination has been rendered unnecessary by admissions or other procedure after Precognition,	0 2 6	0 3 6	0 5 0
<i>Note.</i> —No Precognition Fee will			

	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
to execute any Warrant, and revising Execution,	0 2 0	0 2 6	0 3 6
<i>Note.</i> —When more Executions at the same stage of the Process than one are necessary, and more than one Officer must necessarily be employed, this Fee is to be allowed for instructing and revising each necessarily separate Officer and Execution.			
23. Instructing Counsel to prepare Written Pleadings, or to attend a Verbal Debate, wherever the Judge shall either authorise or subsequently approve of such employment,	0 6 8	0 6 8	0 6 8
24. Revising a paper prepared by Counsel, when such employment is so authorised or approved of,	0 5 0	0 7 6	0 10 0
25. For Auditor's Fees of Taxing :—			
In Decrees of Absence,	0 1 0	0 1 0	0 1 0
In Litigated Cases where the Account is under £10,	0 2 6		
£10 and under £20,	0 5 0		
20 " 50,	0 7 6		
50 " 100,	0 10 0		
100 " 150,	0 15 0		
150 and upwards,	1 0 0		
26. Agency :—			
Conducting proceedings under Edicts of Executry until Confirmation, and under Tutorial or Curatorial Edicts and Brieves till ready for extract.			
(See full Table for proceedings in Commissary Court.)			
<i>Personal Diligence.</i>			
27. Instructing Officer to Charge, and revising his Execution,	0 2 0	0 2 6	0 3 6
28. Copy Executions for Record— <i>per sheet</i> ,	0 1 0	0 1 0	0 1 0
29. Procuring Executions recorded,	0 2 0	0 2 6	0 3 6
30. Drawing Minute for <i>Fiat</i> ,	0 3 0	0 4 0	0 5 0
31. Agency procuring <i>Fiat</i> ,	0 2 0	0 2 6	0 3 6
32. Instructing Officer to apprehend,	0 2 0	0 2 6	0 3 6
33. Framing State of Debt & Copy— <i>per sheet</i> ,	0 2 0	0 2 6	0 3 6
<i>Poundings.</i>			
34. Instructing Officer to Pound,	0 2 0	0 2 6	0 3 6
35. Reporting Pounding, and attendance at procuring Warrant to Sell,	0 3 0	0 4 0	0 5 0
36. For Copy Warrant for Service, instructing Officer, making out Account of Expenses for Taxation, attending Auditor, and Framing State of Debt			

for Sale, including ordering Sale, see the charges under §§ 5, 6, 19, 25, and 33, respectively.

Sales.

	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
37. Fee on Reporting Sales under Poindings or Sequestrations, or any other Judicial Sales, including procuring approval of Roup-roll,	0 3 0	0 4 0	0 5 0
38. Fee on obtaining Warrant to pay,	0 2 0	0 2 6	0 3 6
39. Fee for conducting Sale, whether by the Procurator, or a person not the Procurator, including Auctioneer's Fee, when the free proceeds of the Roup-roll are under £100, at the rate of £5 per cent; for all above, £2, 10s. per cent; besides the necessary outlay, and 1s. per sheet for an Assistant Clerk.			

Diligence affecting Heritage.

40. For applying for Letters of Inhibition, Interdiction, General or Special Charge, Hornings against Superiors, and the like,	0 2 6	0 3 0	0 3 4
41. Instructing Officer to charge, Where separate Executions by separate officers are necessary, this Fee for each to be allowed.	0 2 0	0 2 6	0 3 6
42. For getting Recorded,	0 3 0	0 5 0	0 6 8
43. Copies for Record, Where Inhibition or Interdiction, &c., requires to be recorded in different Counties, Half-Fees additional to be allowed for getting recorded in each additional County.	0 1 0	0 1 0	0 1 0

Advocations.

44. Intimating to Clerk of Court and opposite party,	0 2 0	0 2 6	0 3 6
45. To Advocator's Agent for procuring Bond of Caution and getting it executed and lodged,	0 3 0	0 4 0	0 5 0
46. To Agent of opposite party for inquiries as to sufficiency of Cautioner,	0 3 0	0 4 0	0 5 0
47. Any discussion or other proceedings will be regulated by §§ 3, 4, 9, 12, 13, 14, &c.			

Loosing Arrestments.

48. Fee procuring Bond of Caution and getting it executed and lodged,	0 3 0	0 4 0	0 5 0
49. Fee obtaining Loosing,	0 2 0	0 2 6	0 3 6

TABLES OF FEES.

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	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
50. The Fees for any inquiries or discussion occurring here to be regulated as in §§ 45, 46, 47, &c.			
<i>Affidavits.</i>			
51. Same as in No. 5.			
<i>Advertisements.</i>			
52. Wherever ordered by Statute, or by the Judge— <i>per sheet</i> ,	0 3 0	0 4 0	0 5 0
53. One Fee only for ordering insertion, whether in one or more newspapers,	0 2 0	0 2 6	0 3 4
<i>Appeals to Circuit-Court of Justiciary.</i>			
54. Drawing Appeal— <i>per sheet</i> ,	0 3 0	0 4 0	0 5 0
55. Procuring Bond, and getting signed and lodged,	0 3 0	0 4 0	0 5 0
56. Serving Copy, Indorsing Certificate, and lodging with Clerk,	0 3 0	0 4 0	0 5 0
57. All the other business to be charged for according to the Fees for similar business in the foregoing Table; excepting attendance in Court when the Appeal is discussed, for which a charge <i>per hour</i> will be allowed of	0 3 0	0 4 0	0 5 0
<i>Procurator-Fiscal.</i>			
58. For his concurrence, <i>when</i> required,	0 1 6	0 2 0	0 3 0

FOR BUSINESS IN THE COMMISSARY COURTS.

	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
59. Drawing Petition for Decree-Dative,	0 4 0	0 5 0	0 6 0
60. Presenting Petition at Commissary Office, and directing the necessary publication,	0 2 0	0 2 6	0 3 6
<i>In Application for Confirmation of Executors qua Creditor—</i>			
61. Drawing Inventory of productions as in No. 8,	0 1 0	0 1 6	0 2 0
<i>After Publication of Petition for Decree-Dative—</i>			
62. Attendance in Court, moving for and obtaining Decree-Dative,	0 3 6	0 5 0	0 6 8

	SCALE I.			SCALE II.			SCALE III.		
	£	s.	d.	£	s.	d.	£	s.	d.
<i>For Inventory of Moveable Estate—</i>									
63. Fee for attendance obtaining the necessary information relative to the nature of the Moveable Estate and all other particulars necessary to enable the Inventory to be prepared, . . .	0	3	6	0	5	0	0	6	8
64. Drawing Inventory— <i>per sheet</i> , . . .	0	4	0	0	5	0	0	6	0
Extending Ditto— <i>per sheet</i> , . . .	0	1	6	0	1	6	0	1	6
65. Drawing Deposition, . . .	0	2	6	0	2	6	0	2	6
66. Attendance before the Commissary or Justice of Peace, or other party authorised to administer the Oath, with the Executor, when the Oath is taken, . . .	0	3	6	0	5	0	0	6	8
67. Agency taking out Bond of Caution, getting it subscribed, and thereafter Lodging it with the Clerk, . . .	0	3	6	0	5	0	0	6	8
68. Agency procuring attestation of Cautioner's sufficiency, . . .	0	2	0	0	2	6	0	3	4
<i>Where it is necessary to obtain Restriction of Caution—</i>									
69. Drawing Petition— <i>first sheet</i> , . . .	0	4	0	0	5	0	0	6	0
Each succeeding necessary sheet, . . .	0	2	0	0	3	0	0	4	0
70. Fee on interlocutor ordering Advertisement, . . .	0	3	6	0	5	0	0	6	8
71. Fee on Interlocutor restricting, or refusing to restrict Caution, . . .	0	3	6	0	5	0	0	6	8
<i>When Caution is restricted, the Fees for taking out Bond of Caution, getting it executed, attested, lodged, &c., the same as above—</i>									
72. Each necessary letter, . . .	0	2	0	0	2	6	0	3	4
<i>In cases where the Domicile of the Deceased requires to be shown to have been in Scotland—</i>									
73. Drawing Petition— <i>first sheet</i> , . . .	0	4	0	0	5	0	0	6	0
Each succeeding sheet, . . .	0	2	0	0	3	0	0	4	0
74. Fee, presenting Petition, . . .	0	2	0	0	2	6	0	3	6
75. Fee on Interlocutor allowing a Proof being pronounced, . . .	0	3	6	0	5	0	0	6	8
76. Intimating the same to Clients, . . .	0	2	0	0	2	6	0	3	4
77. Fee for Precognosing each Witness examined, . . .	0	2	6	0	3	6	0	5	0
78. For Agency getting Diet of Proof fixed, and intimating it, . . .	0	2	0	0	2	6	0	3	4
79. Instructing Officer to cite Witnesses, . . .	0	2	0	0	2	6	0	3	4
80. Attendance at Proof— <i>per hour</i> , . . .	0	4	0	0	5	0	0	6	8
81. Fee on Interlocutor disposing of the Proof, . . .	0	3	6	0	5	0	0	6	8

	SCALE I.			SCALE II.			SCALE III.		
	£	s.	d.	£	s.	d.	£	s.	d.
82. Fee for procuring Confirmation, viz. :— Where the value of the estate does not exceed									
£100,	0	5	0						
250,	0	10	0						
500,	0	15	0						
1000,	1	1	0						
2000,	1	11	6						
5000,	3	3	0						
Upwards of £5000,	5	5	0						
83. For Drawing and Inserting Advertisements, as in Nos. 52 and 53.									
84. For extending, and for Fair Copies when necessary, except when otherwise fixed, as in No. 6.									
85. For attendances at the Clerk's Office, except when otherwise fixed, as in No. 19.									
86. When a competition arises for the office of Executor, or any other question occurs requiring a record to be made up, or when Agents are required by the Commissary to be heard, the same Fees to be allowed which are allowed according to the scale for similar business in this Table; failing which, in the Table of Fees for the Sheriff-Court.									

DUN. M'NEILL, *I.P.D.*

X.—OFFICERS' FEES.

ACT OF SEDERUNT regulating the Fees of Procurators and Practitioners in the Sheriff and Stewart Courts of Scotland.—Edinburgh, 6th March 1833; renewed, 2d June 1837.

TABLE OF FEES IN CIVIL BUSINESS FOR SHERIFF OFFICERS
IN SCOTLAND.*Citations.*

For executing a summons, or charging on a decree or registered protest, or using arrestment, or serving a petition or complaint, minute, interlocutor, or warrant, or intimation, or citing for examination,—for each of these several acts, and returning execution, the following fees will be allowed for officer and witnesses :—

When the demand does not exceed the sum which may be competently pursued for in the Sheriff Small-Debt Court, £0 1 6
Above the sum which may be competently pursued for in the Sheriff Small-Debt Court and not exceeding £50, 0 2 0

as applicable to the price (exclusive of the feu-duty or rent), to be paid equally by the superior as seller, and by the purchaser, as in No. 6. So far as applicable to the feu-duty or rent, by the purchaser as feuar or tenant, as in No. 10.

11. Contracts of Ground Annual, Building Leases, and Bilateral Deeds of this class.

Charge.—Same as in No. 10.

Pro. Rule.—To be drawn by the disponent's or landlord's agent, and revised by the agent of the disponent or tenant; the whole expense, including stamp-duty and revising fee, to be paid by the parties equally.

12. Charters and Writs by Progress, and Precepts and Writs of *Clare Constat*.

Charge.—Where the value of the property does not exceed £300, 10s.; exceeding £300, and not exceeding £1000, £1; exceeding £1000, for each additional £1000 up to £5000, £1, exceeding £5000, for each additional £1000 up to £20,000, 5s.; exceeding £20,000, for each additional £1000, 2s. 6d. For any part of £1000, after allowing for one or more entire sums of £1000, the charge to be as for £1000; besides regulation fees, as in No. 38. The value to be fixed by taking twenty five years' purchase of the gross rents in the case of lands; twenty years' purchase in the case of feu-duties and ground annuities; and twelve years' purchase in the case of houses,—deducting in all cases feu-duties and ground-rents. Engrossing in chartulary both the charter or writ, and such part of the deed on which it is written as is necessary, 2s. 6d. per sheet. The above charges to include all correspondence and attendances.

Pro. Rule.—The drafts of Crown charters, precepts, and writs of *clare constat* are prepared by the vassal's agent; of such deeds and writs from subjects by the superior's agent, the vassal's agent revising them. The fees here stated are to be charged by the agent of the vassal or grantee when the deed or writ is granted by the Crown; and by the agent of the superior when by a subject. The vassal or grantee pays the whole expense, including stamp-duty and the revising fee, when his agent revises the deed or writ.

13. Completing and carrying through Crown charters and other Crown writs, including gifts of *ultima hæres*.

Charge.—Where the value of the property does not exceed £1000, £1; exceeding £1000, for each additional £1000 up to £5000, £1; exceeding £5000, for each additional £1000 up to £20,000, 5s.; exceeding £20,000, for each additional £1000, 2s. 6d. For any part of £1000, after allowing for one or more entire sums of £1000, the charge to be as for £1000. These charges to be in addition to those in No. 12, except that in the case of gifts of *ultima hæres* the charges in No. 13 only shall be made. But, as in the case of adjudica-

tions for debt, a large estate may be adjudged for an inconsiderable debt, or a small estate for a large debt, it shall be optional to the vassal whether the fees of the charter, precept, or writ, under Nos. 12 and 13, shall be calculated on the value of the subject or the sum in the adjudication.

Pro. Rule.—Same as in No. 12.

14. Writs of Acknowledgment in Heritable Securities, and under long Leases.

Charge.—Same as in No. 12.

Pro. Rule.—To be drawn by agent of granter, and revised by heir's agent; the whole expense, including stamp-duty and revising fee, to be paid by the heir.

III.—FEES OF SECURITIES FOR MONEY LENT, AND RELATIVE DEEDS.

15. Personal Bonds.

Charge.—For each £100, 10s. 6d.

Pro. Rule.—To be written by agent of lender, and paid for by borrower.

16. Heritable Bonds, and Dispositions or Assignations, or other Conveyances or Deeds in Security, including Deeds constituting real burdens, where there is no personal bond.

Charge.—The sum in the security not exceeding £300—For each £100, £1, 1s. The sum exceeding £300—The above rate for the first £300, and for each additional £100, 10s. 6d. In Nos. 15 and 16, though the sum be less than £100, the charge to be as for £100, and for any part of £100, after allowing for one or more entire sums of £100, the charge to be as for £100. In Nos. 15 and 16 the borrower's agent to be paid by his own client for obtaining the loan and revising the bond, half the sum payable to the lender's agent for preparing the bond.

Pro. Rule.—Same as in No. 15.

17. Mortgages on Ships.

Charge.—Sum not exceeding £500, £1, 1s.; exceeding £500, and not exceeding £2000, £2, 2s.; exceeding £2000, for every additional £1000, the charge for any part of £1000, after allowing for one or more entire sums of £1000, to be as for £1000, £1, 1s.; but not to exceed £21 in whole. The borrower's agent to be paid as in No. 15.

Pro. Rule.—Same as in No. 15.

18. Bonds of Annuity, whether personal or heritable.

Charge.—Where a price paid, the same as in No. 15, holding the price paid as the consideration. Where no price paid, to be charged as bonds of provision, No. 23.

Pro. Rule.—To be written by agent of grantee, and paid for by granter.

19. Bonds of Corroboration.

Charge.—Where additional security is given, whether personal

or heritable, or where the interest due is accumulated with the principal, to be charged at *one-third* of the fees in No. 15, calculated upon the sum in the bond of corroboration, besides regulation fees, as in No. 38. Where the bond is granted merely for the purpose of binding the heir of the original debtor, to be charged regulation fees only, as in No. 38.

Pro. Rule.—Same as in No. 15.

20. Discharges and Renunciations or Restrictions of Heritable Debts ; and discharges of Personal Debts.

Charge.—To the debtor's agent. Where the amount of the debt is under £500, regulation fees, as in No. 38 ; where £500, or above that sum, double regulation fees. Half of these fees to be paid to the creditor's agent for revising. In cases of restriction, the creditor's agent may, at the debtor's expense, make a copy of the deed of restriction, to be kept with the writs of the security.

Pro. Rule.—To be drawn by agent of debtor, and revised by agent of creditor. The whole expense, including stamp-duty and revising fee, to be paid by debtor.

21. Assignations or Conveyances of Debts, heritable or personal.

Charge.—Where the transaction is negotiated as a loan, the same as in No. 15 ; where that is not the case, as in No. 20. The revising fee to the agent of grantor to be as in No. 20.

Pro. Rule.—To be drawn by agent of grantee, and revised by agent of debtor, and also by agent of grantor. The whole expense, including stamp-duty and revising fees, to be paid by debtor.

IV.—FEES OF MARRIAGE-CONTRACTS, DEEDS OF ENTAIL, TRUST-DEEDS, FAMILY SETTLEMENTS, AND OTHER DEEDS OF THE LIKE CLASS, &c.

22. Marriage-Contracts.

Charge.—Where the jointure and other income provided to the wife or husband, or both (the interest of capital sums provided being calculated at 4 per cent), do not amount in whole to £100, double regulation fees. Where such jointure and other income amount to or exceed £100, for every £100, £3, 3s. ; and for any part of £100, after allowing for one or more entire sums of £100, the charge to be as for £100, besides regulation fees, as in No. 38. But if, besides such jointure or other income, there are provided to, or for, the child or children funds or property exceeding the amount or value of £2000, treble regulation fees will be charged in place of double as above, when the jointure and other income do not amount to £100, and in place of single, as above, when such jointure and other income amount to or exceed £100, no charge being made in respect of such funds or property where or so far as the income arising therefrom is provided to the wife or

husband, or both, and charged for accordingly. Duplicates to be charged only the fees of engrossing, as in No. 42.

Note.—The above to include all trouble in examining titles and searches, and in meetings and correspondence.

Pro. Rule.—To be drawn by agent for the wife, and revised by agent for the husband. The whole expense, including stamp-duty and revising fee, to be paid by husband.

23. Deeds of Entail, Deeds of Consent to Disentail, Instruments of Disentail, Trust-Dispositions and Settlements, Trust-Deeds for behoof of Creditors, Bonds where no Money is lent or due, Dispositions, Assignations, or other Conveyances where no price is paid, Testamentary Deeds and Bonds of or by way of Provision, Bonds of Annuity where no price is paid, and Deeds conveying the Property or Residue in implement of any Deeds of the above Class.

Charge.—Where the value of the property does not exceed £1000, regulation fees; where the value exceeds £1000, and does not exceed £2000, double regulation fees; and where it exceeds £2000, treble. In the case of entails and other settlements, and trust-deeds for creditors, charges may be made also for correspondence and attendances.

24. Discharges of Legacies, Provisions, and Residues.

Charge.—Where the amount or value of the legacy or residue does not exceed £200, one-half per cent.; if above that sum, and not exceeding £1000, one-half per cent. for the first £200, and one-fourth per cent. for what is above that sum; if above £1000, these fees for the first £1000, and one-eighth per cent. for all above, besides the regulation fees (as in No. 38) of drawing the deed where it applies to residue.

Note.—In cases of legacies (not residue) the above fees to include charges for correspondence and attendances, as well as the trouble in settling the legacy-duty.

Pro. Rule.—To be written by agent for testator's successors, and paid for by legatee.

V.—REGISTRATION OF DISPOSITIONS AND OTHER WRITS REQUIRING WARRANT OF REGISTRATION, AND WHERE THERE IS NOT ALSO A NOTARIAL INSTRUMENT.

25. For preparing the Warrant, and preliminary Examination of the state of the Title.

Charge.—Where the value does not exceed £300, 6s. 8d.; exceeding £300, and not exceeding £1000, £1, 1s.; exceeding £1000, and not exceeding £3000, £2, 2s.; exceeding £3000, £3, 3s.

Pro. Rule.—To be written by agent of the party in whose favour it is expedite, and paid for by such party, except that when following on a marriage-contract or deed of security, it is to be paid for by the party who pays for such contract or deed.

For preparing the Warrant of Registration in all cases rendered necessary by the Registration Act of 1868, where Warrants were not required before, there shall be charged the following fees:—

Where the value or sum in the writ is under £1000,	£0	10	6	
Where the value or sum is under £2000,	.	1	1	0
Where the value or sum is £2000 or upwards,	.	2	2	0

Note.—These fees are to be paid by the party who pays for the preparation of the writ, and are to include the present fee for ingiving and out-taking of the writ.

VI.—FEES OF INSTRUMENTS OF SASINE, NOTARIAL INSTRUMENTS, AND OTHER NOTARIAL BUSINESS.

26. Instruments of Sasine, Notarial Instruments under Heritable Securities Acts, Registration of Leases Act, and Titles to Land Act, or any similar Act to be hereafter passed.

Charge.—For expeding the instrument, where the value of the property or sum in the security does not exceed £500, £1, 1s.; exceeding £500, and not exceeding £1000, £2, 2s.; exceeding £1000, and not exceeding £2000, £3, 3s.; exceeding £2000, and not exceeding £5000, £4, 4s.; exceeding £5000, and not exceeding £10,000, £5, 5s.; and for every additional £5000, the charge for any part of £5000, after allowing for one or more entire sums of £5000, to be as for £5000, £1, 1s.; besides regulation fees, as in No. 38, for drawing the instrument.

Pro. Rule.—Same as in No. 25.

27. Miscellaneous Notarial Instruments.

Charge.—For drawing the schedule of protest, or the instrument, where no schedule is required—to be charged as in No. 40. For extending and attesting the instrument, where a schedule has previously been prepared, first sheet, 2s. 6d.; every other, 1s. 6d.

28. Notarial Copies.

Charge.—First sheet, 2s. 6d.; every other, 1s. 6d.

29. Protesting and Noting Bills.

Charge.—If sum under £30, 2s. 6d.; £30, and under £100, 3s.; £100, and under £200, 4s.; £200 and upwards, 5s.

Pro Rule.—If the protest is taken at a distance, a further charge to be made for the time occupied (as in No. 47), and for travelling expenses.

VII.—PROCURING INFECTMENTS WITHIN BURGHE.

30. Agency, including any Preliminary Examination of Titles, Revising the Instrument, Correspondence, and Attendances.

Charge.—Where the property is under the value of £50, 7s. 6d.; £50, and under £100, 10s. 6d.; £100, and under £200, 15s.; £200 and under £500, £1, 1s.; £500, and under £1000, £1,

7s. 6d.; £1000, and under £2000, £1, 11s. 6d.; £2000 and upwards, £2, 2s. The above charge to apply to notarial instruments as in place of instruments of sasine when burgage titles are placed on a footing similar to that of feudal subjects.

VIII.—FEES OF LEASES, VARIOUS OTHER CONTRACTS, PRESENTATIONS AND FACTORIES.

31. Agricultural Leases, and Leases of Dwelling-houses, Inns, Mills, and Manufactories, not being Building Leases.

Charge.—Where rent does not exceed £100, regulation fees, as in No. 38; exceeding £100, and not exceeding £200, £2, 2s.; exceeding £200, and not exceeding £300, £3, 3s.; and for every additional £100, the charge for any part of £100, after allowing for one or more entire sums of £100, to be as for £100, £1, 1s. Duplicates, or certified copies for the tenants, engrossing fees only, as in No. 42.

Pro. Rule.—To be prepared by agent for landlord. The fees and stamp-duties to be paid equally by the landlord and tenant.

32. Leases of Minerals, Quarries, or other subjects, of which the substance is exhaustible during the Lease.

Charge.—To be charged one-third of fees in No. 6, value taken at twenty years' purchase of fixed rent, besides regulation fees, as in No. 38, for drawing. One-half of the above fees for revising. Duplicates, or certified copies for the tenants, engrossing fees only, as in No. 42.

Pro. Rule.—To be drawn by agent for landlord, and revised by agent for tenant. The whole expense, including stamp-duty and revising fee, to be paid by the parties equally.

33. Submissions and Decrees Arbitral.

Charge.—For each of these deeds, where not exceeding two sheets, £1, 11s. 6d.; for each sheet above two, 6s., besides charges for necessary attendances and fees of writing minutes, notes of opinion, &c., by arbiters. Formal letters sending copies of orders not to be charged.

Pro. Rule.—Submissions to be drawn by the agent of the party *in petitorio*, and revised by the agent of the opposite party. The whole expense, including stamp-duty and revising fee, to be paid by the parties equally.

34. Contracts of Copartnery.

Charge. Where the stock of the company is defined, to be charged according to the amount of the stock, as follows:—When the stock is under £500, £4, 4s.; £500 and under £1000, £5, 5s.; £1000 and under £2000, £6, 6s.; £2000 and under £4000, £7, 7s.; £4000 and under £6000, £8, 8s.; £6000 and under £8000, £9, 9s.; £8000 and under £10,000, £10, 10s.; and for every additional £1000, the charge for any part of £1000, after allowing for one or

more entire sums of £1000, to be as for £1000, 10s. 6d., besides regulation fees, as in No. 38, where the stock exceeds £2000, but the total fees of drawing in no case to exceed £210. When the stock is not defined, the deed to be charged double regulation fees.

35. Contracts and Agreements for building Ships, constructing Docks, erecting extensive Works, and others of similar importance not otherwise provided for.

Charge.—One-third of the fees of dispositions, as in No. 6, according to the value of the transaction, when the amount is stated. Where no amount is stated, double regulation fees, exclusive of specifications.

Pro. Rule.—To be drawn by agent of owner or employer, and revised by agent of the other party. The whole expense, including stamp-duty and revising fee, to be paid by the parties equally.

36. Presentations to Church Livings, and relative Proxies.

Charge.—Drawing the deeds, and trouble in transmitting to presentee, or to the presbytery, £5, 5s.

Pro. Rule.—To be written by agent for patron, and paid for by presentee.

37. Factories and Powers of Attorney.

Charge.—Regulation fees, as in No. 38.

IX.—FEES FOR DRAWING DEEDS AND PAPERS, ACCORDING TO LENGTH.

38. All Deeds, Obligations, Contracts, Agreements, Indentures, Instruments, Petitions for Service, Inventories of Titles to be signed as relative to deeds, Tutorial and Curatorial Inventories, Inventories of Personal Estate, and relative Affidavits, and other probative Writings, not chargeable *ad valorem*.

Charge.—First sheet of 250 words, 10s.; every other, 6s.; though there be not 250 words in all, the deed to be charged as one sheet, and any remaining number of words, after calculating the number of sheets of 250 words each, to be charged as an additional sheet. These are the charges called "*Regulation Fees*."

Pro. Rule.—Where there are two parties to the transaction, the whole expense, including stamp-duty and revising fee, is to be paid by the parties equally; but indentures are to be written by agent for master, and paid for by apprentice.

39. Going through, examining, and arranging Title-deeds, where there is no Deed or Inventory prepared in connection therewith.

Charge.—To be charged according to the time necessarily occupied, as in No. 47.

40. Memorials, Cases, Minutes of Meetings, if not covered by charges under No. 47, Inventories of Writs not to be signed as relative to Deeds, Certificates and Affidavits of execution

of Deeds, Schedule of Protost or Instrument where no Schedule is required, and other Papers not chargeable as Deeds.

Charge.—Every sheet or part of a sheet of 250 words, 6s.

41. Figured States.

Charge.—First sheet, folio size, 12s.; every other, 9s.

X.—FEES FOR ENGROSSING DEEDS AND COPYING PAPERS.

42. For Engrossing Deeds of all kinds, and Notarial Instruments.

Charge.—Every sheet or part of a sheet of 250 words, 2s.; if in Latin, 3s.

43. For Copying Papers of all kinds.

Charge.—Every sheet or part of a sheet of 250 words, 1s. 6d; if in Latin, 2s. 6d.

44. For Copying ruled and Figured States and Accounts.

Charge.—Every sheet or part of a sheet of ordinary size, 2s.; if folio size, 4s.

XI.—COMMISSION ON BUYING AND SELLING PROPERTY AND ON MONEY TRANSACTIONS.

45. For Buying or Selling Heritable or other Property.

Where the purchase or sale is effected by the client, there is no charge for commission; where effected by the agent, the result of much inquiry as to the practice of the profession shows that the rates of commission in use to be charged have ranged from one quarter per cent. to one per cent. on the amount of the price. It is impossible to lay down any general rule which will fairly meet all cases, but it is recommended that in cases of ordinary occurrence the charge should be *one quarter per cent. on the price*, such charge embracing all meetings, correspondence, and trouble prior to the purchase or sale of the property in respect of which the charge is made.

46. For proper Money transactions.

The practice here also has varied considerably; but in cases of ordinary occurrence, the following rates are considered reasonable and proper, viz.—(1st.) For collecting or recovering rents and feu-duties *three per cent.* (2d.) For collecting or recovering termly interests, *one per cent.* (3d.) For recovering outstanding debts, not due on bond, bank deposit, bank account, or the like, *one per cent.* Where rents of large amount, payable by a few tenants, are collected, the rate here stated is too high; and, on the other hand, where the rents are small, and drawn from many tenants, the rate is too low. A general rule cannot be laid down, but it will not be difficult for parties to fix a fair rate, where due regard is had to the circumstances, and the extent of trouble in each case. As to debts due on bond, bank deposit, bank account, or the like, as well as other money transactions, it is impossible to fix a

rate of commission, because this must be regulated by the amount of the money, and of the trouble in receiving or paying it. When an agent recovers debts due on bond, bank deposit, bank account, or the like, in order to investment, and when he does invest the money, no charge should be made for commission on recovering the money so invested.

These charges for commission apply to the agent in his capacity as such, and do not apply to parties acting as trustees on sequestrated estates, or in voluntary trusts for behoof of creditors or judicial factors. In these latter cases higher rates of commission are allowed.

XII.—CHARGES ACCORDING TO TIME OCCUPIED AND FEES OF ORDINARY AGENCY AND CORRESPONDENCE.

47. Agent's charges for his own time.

Charge.—If out of Edinburgh, per day, £5, 5s.; besides actual travelling expenses, and £2, 2s. per day as personal expenses if in London, and £1, 11s. 6d. if elsewhere; if in Edinburgh, for every hour or part of an hour, 10s.; attending meetings of trustees, and taking notes for minutes, £1; for every hour or part of an hour after the first, 10s.; attendance at sealing the repositories of deceased parties, and writing minutes, £1, 1s.; attendance at opening the repositories, and writing minutes, £1, 1s.; or if long engaged, to be charged according to time.

Pro Rule.—When the minutes are written out at the meeting, the drawing fees are not to be charged; but if afterwards drawn from the notes, they are to be charged as in No. 40.

48. Agent's charges for his Clerk's time.

If out of Edinburgh, per day, £2, 2s., besides actual travelling expenses, and £1, 1s. per day as personal expenses.

49. Agency.

Attendance presenting deeds and instruments to be recorded in public registers, 10s.; sending a general retainer to counsel, and enteringsame, £1; sending any other fee to counsel with or without a memorial, 10s.; perusing a case, and relative papers for the opinion of counsel, when not prepared by the agent in Edinburgh, for every hour or part of an hour, 10s.; obtaining the opinion of counsel where the case is not prepared by the agent in Edinburgh, 10s.; attendance at consultation with counsel, in all cases, if desired, 10s.; perusing and considering the opinion in all cases, 10s.; perusing and considering documents where not necessarily involved in another charge, for every hour or part of an hour, 10s.

Pro. Rule.—The agent to be entitled in all cases to book the opinion for after reference, for which copying fees are to be charged as in No. 43.

50. Correspondence.

Writing each letter, every sheet, or part of a sheet, of 250 words, 5s.

Pro. Rule.—All written communications to counsel in the conduct of business unaccompanied by a fee, and not being memorials, to be charged as letters. Letters or attendances relating to deeds for which an *ad valorem* charge, or to transactions for which a factor-fee or commission is allowed, not to be charged.

51. Revising Deeds drawn by others.

Charge.—Half of the fees of drawing.

Pro. Rule.—To be paid in every case to the agent by his own employer, except when otherwise specially provided for.

XIII.—AGENCY IN EXPEDING SERVICES.

52. For expediting any Special Service, or a General Service as Heir of Provision, including previous investigation in order to ascertain the state of titles, or to determine the character in which Heir ought to be served.

Charge.—Where the value of the property is under £500, £1, 1s.; £500 and under £1000, £2, 2s.; £1000 and under £3000, £3, 3s.; £3000 and under £5000, £4, 4s.; £5000 and upwards, £5, 5s.; besides regulation fees of drawing papers and proof, as in No. 38.

53. For expediting any other General Service, including as above.

Charge.—A fee of £1, 1s., besides regulation fees of drawing papers and proof, as in No. 38, and charges for attendances.

XIV.—AGENCY IN EXECUTRY PROCEEDINGS¹

54. For investigating, obtaining information, and making calculations, in order to ascertain amount of Personal Estate.

Charge.—Where the value of the estate is under £500, £1, 1s.; £500 and under £1000, £2, 2s.; £1000 and under £3000, £3, 3s.; £3000 and under £5000, £4s, 4s.; £5000 and upwards, £5s, 5s.; besides regulation fees of drawing inventory and affidavit, as in No. 38.

55. For carrying through Confirmations.

Charge.—Regulated by Act of Sederunt, 10th March 1849, as regards Commissary Court practitioners. Where the value of the estate is under £100, 5s.; £100 and under £250, 10s.; £250 and under £500, 15s.; £500 and under £1000, £1, 1s.; £1000 and under £2000, £1, 11s. 6d.; £2000 and upwards, £2, 2s.

XV.—FEES AND AGENCY IN PARLIAMENTARY AND RAILWAY BUSINESS.

56. Gazette Notices.

Charge.—First sheet, £1, 10s.; every other, 18s. To include all meetings and correspondence with engineers and parliamentary agents relative to the final adjustment of Gazette notices.

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63. **Agent's charges for his own time in London.**

Charge.—For each day's attendance promoting or opposing a bill, £5, 5s.

Note.—When the agent has charge, on behalf of the same client, of more bills or oppositions than one before committee at the same time, the charge of £5, 5s. shall be held to apply to a day of eight hours. For each additional hour the agent shall be entitled to make a further charge of 10s. 6d. The agent shall also be allowed his actual travelling expenses to and from London, and £2, 2s. per day for personal expenses while in London. See No. 47.

64. **Agent's Charges for his Clerk's time in London.**

Charge.—Clerk's time, per day, £2, 2s., besides actual travelling expenses to and from London, and £1, 1s. per day for personal expenses while in London.

65. **Contracts for execution and maintenance of Works of Railways.**

Charge.—The same as in No. 35.

Pro. Rule.—The company's agent draws the deed. The whole expense, including stamp-duty and revising fee, when deed revised by contractor's agent, to be paid by the parties equally.

66. **General Business.**

Charge.—All contracts, agreements, or other deeds not herein-before specially provided for, first sheet, 10s.; every other, 6s.; meetings, per hour, 10s.; letters, per sheet, 5s.; revising proofs of prints, not exceeding 10 pages of print, 6s. 8d.; each additional 10 or part of 10 pages, after allowing for entire quantities of 10 pages, 6s. 8d.; memorials, briefs, petitions, and other papers not chargeable as deeds, and not herein-before specially provided for, 6s. per sheet.

Copying.

Charge.—Copying of all necessary papers to be allowed for as in No. 43, in addition to the charges for drawing or preparing the deeds or documents; engrossing contracts or agreements on large rolls of paper, first sheet, 5s.; every other, 3s.; engrossing ordinary deeds, 2s. per sheet.

NOTE APPLICABLE TO THE WHOLE TABLE.—In all cases where *res ad valorem* are allowed for drawing or revising deeds, it is understood to be optional to the agents to charge either the fees *ad rem*, or the regulation fees of drawing or revising, according to length, as fixed by Nos. 38 and 51.

SIGNET LETTERS.

XVI.—FEES FOR PREPARING LETTERS OF HORNING, &C.

Letters of horning and pointing, caption, arrestment, supple-

- ment, and lawburrows—first sheet, estimated as the legal sheet (300 words), 5s. ; every other sheet so estimated, 2s.
69. Inhibitions, hornings against superiors, and summonses of adjudication—first sheet, 10s. ; second sheet, 6s.
70. All other summonses passing the signet—6s. per sheet.

XVII.—FEES PAYABLE AT SIGNET OFFICE.

When Writs are presented during the Office hours, viz., from 3 to 4 daily, except Saturday, on which day, from 11 to 12, the Office being shut on Public Holidays.

71. Horning, . . .	£0	3	1	Horning against superiors, . . .	£0	2	8
Caption, . . .	0	0	10	General and special charge, . . .	0	0	10
Arrestment, . . .	0	0	10	Summons, . . .	0	1	8
Losing arrestment, . . .	0	10		Summons and arrestment, . . .	0	2	6
Supplement, . . .	0	0	10	Incident diligence, . . .	0	0	10
Lawburrows, . . .	0	0	10	First and Second diligence, . . .	0	1	8
Inhibition, . . .	0	0	10	Commission, . . .	0	0	10
Do. with arrestment, . . .	0	1	5	Poining the ground, . . .	0	0	10
Publication of interdiction, . . .	0	0	10				

By order of the Keeper, the Officers of the Signet are *allowed* to signet any writ (not being an inhibition) at extra hours, on payment of *extra* fees, as follows, viz. :—

On Monday, Tuesday, Wednesday, Thursday, and Friday, even though holidays, from 10 A.M. to 3 P.M., on payment of an *extra* fee of 5s. ; and from 7 to 8 P.M. on payment of an *extra* fee of 10s.

On Saturday, though a holiday, from 10 to 11 A.M., on payment of an *extra* fee of 5s. ; from 2 to 3 P.M. on payment of an *extra* fee of 10s.

The Officers are *prohibited* from signeting inhibitions at *extra* hours.

The fees are now payable in fee stamps.

XII. TABLE OF FEES

FOR CONVEYANCING AND GENERAL BUSINESS,
AND PROFESSIONAL RULES APPLICABLE
THERE TO,

OF

THE FACULTY OF PROCURATORS IN GLASGOW.

At Glasgow, the 7th day of January 1870. At a general meeting of the Faculty of Procurators in Glasgow, Thomas Stout, Esq.,

in the chair. There was submitted proof of a new Table of Fees, proposed by the committee appointed at the meeting held on 19th November last. The meeting having considered the same, and made some alterations thereon, agreed to adopt the same as so amended as the Rule of Charge for the Members of Faculty, as from and after 1st January 1870.

T. STOUT, *Chairman*.

I.—FEES FOR DRAWING ACCORDING TO LENGTH.

1. All deeds, instruments, and tested documents, not chargeable under special heads, *infra*.
Charge.—First sheet of 250 words, 10s. ; every other, 6s. These hereafter called "*regulation fees*."
2. Other papers not chargeable as deeds.
 - (a) Figured states.
Charge.—Folio size—first sheet, 12s. ; every other, 9s. Ordinary size—first sheet, 8s. ; every other, 4s.
 - (b) Inventories or lists for lending or transmitting papers.
Charge.—Each sheet, 3s.
 - (c) Other papers.
Charge.—Each sheet, 6s.
Pro. Rule.—Not to be charged when a factor fee or commission allowed.

II.—FEES FOR ENGROSSING DEEDS AND COPYING PAPERS.

3. Engrossing deeds, &c.
Charge.—Each sheet, 2s.
4. Copying papers.
 - (a) Figured states.
Charge.—Each sheet of ordinary size, 2s. ; each sheet of folio size, 4s.
 - (b) Other papers.
Charge.—Each sheet, 1s. 6d.
Pro. Rule.—Not to be charged when a factor fee or commission allowed, except for extra copies.

III.—FEES RELATING TO SALES AND CONVEYANCES.

5. Sales by public roup.
 - (a) Articles of roup.
Charge.—Regulation fees.
 - (b) Conducting sale and writing minute of preference.
Charge.—Price under £500, 10s. 6d. £500 and under £1000, £1, 1s. ; £1000 and under £3000, £1, 11s. 6d. And for each additional £1000, or part of £1000, 10s. 6d. But not to exceed £10, 10s.
Pro. Rule.—Payable by seller to his own agent. These fees are in lieu of instrument money.

- (c) Attending sale and purchasing, including meetings with client, and examining titles.

Charge.—The same fees as (b).

Pro. Rule.—Payable by purchaser to his own agent.

- (d) Attendance and writing minute of adjournment when no sale.

Charge.—Each exposure. Price under £1000, 10s. 6d.; £1000 and above, £1, 1s.

6. Contract or minute of sale.

Charge.—Double regulation fees.

Pro. Rule.—To be drawn by seller's agent. Whole expenses, including revising fees, to be paid by parties mutually.

7. Bond for the price.

Charge.—Regulation fees.

Pro. Rule.—To be drawn by seller's agent and paid by purchaser.

8. Dispositions, assignments, or other conveyances upon sales of property.

Charge.—For drawing the deed and final revision and adjustment of it, including examination of titles and searches. Price not exceeding £300—for each £100, or part of £100, £1, 1s. Price exceeding £300. The above rate for the first £300, and for each additional £100, or part of £100, 10s. 6d. Where no price paid, see No. 19.

Pro. Rule.—The purchaser's agent to draw the deed: the seller's agent to revise it. The whole fees of drawing, revising, engrossing, stamps, and inventory of writs, to be paid equally by seller and purchaser.

9. Contracts of excambion.

Charge.—Same as No. 8, holding the joint value of the lands mutually excambied as the price.

Pro. Rule.—To be prepared by the agent for the one party and revised by the other, as may be arranged; but the fees of drawing and revising to be added together and divided equally betwixt the agents. The total expense to be paid by the parties equally.

10. Deeds of relinquishment of superiority, or discharges of ground annuals.

- (a) Where a price paid.

Charge.—Same as No. 8.

Pro. Rule.—Same as No. 8.

- (b) Where no price paid.

Charge.—Same as No. 19.

IV.—FEES OF GRANTS FROM SUBJECT SUPERIORS.

11. Original feu-dispositions, feu-charters, and contracts of feu.

Charge.—Same as No. 8. Estimating the price or sum paid, if any, and twenty years' purchase of the feu-duty as the value of the subjects.

Pro. Rule.—The superior's agent draws the deed—the vassal's pays the expense of it, including engrossing in chartulary, and surveyor's fee for endorsing plan on deed, but not for measuring or laying off ground. If deed required to be recorded for preservation, expense of recording and extracts to be borne mutually by the parties.

12. Charters and Writs by Progress, Precepts and Writs of *Clare Constat*, and Writs of Acknowledgment under Long Leases Act.

Charge.—Value not exceeding £300, 10s.; £300, and not exceeding £1000, £1; exceeding £1000, for each additional £1000 or part thereof to £5000, £1; exceeding £5000, for each additional £1000 or part thereof to £20,000, 5s.; exceeding £20,000, for each additional £1000 or part thereof, 2s. 6d. The value to be fixed, either by taking the price where there has been a recent sale, or by taking twenty-five years' purchase of the rents in the case of lands; twenty years' purchase in the case of feu-duties; and twelve years' purchase in the case of houses, deducting feu-duties and ground-annuals.

Pro. Rule.—Same as No. 11. Superior's agent to charge for engrossing writ in chartulary, and such part of deed on which writ may be written as is necessary.

13. Contracts of ground-annual, building leases and bilateral deeds of this class.

Charge.—Same as No. 11.

Pro. Rule.—Disposer or superior's agent draws the deed—the whole expenses, including fees of revising, and surveyor's fee as in No. 11, to be paid equally by the parties.

V.—FEES OF SECURITIES AND RELATIVE DEEDS.

14. Personal Bonds; Bonds and Dispositions in Security; and Dispositions or Assignations or other Conveyances or Deeds in Security; Deeds constituting real burdens; bonds of Caution and Relief; and Bonds of Annuity.

- (a) For preparing the principal security deed.

Charge.—The sum in security not exceeding £300—For each £100, or part of £100, £1, 1s. Exceeding £300—The above rate for the first £300, and for each additional £100, or part of £100, 10s. 6d.

- (b) For subsidiary deeds.

Charge.—Regulation fees.

- (c) Assignations, in lieu of discharges.

Charge.—To be charged as discharges, under No. 17.

Pro. Rule.—To be drawn by agent of lender, and paid for by borrower. The borrower's agent to be paid by his own client for revising the deeds (which includes trouble, if any, for procuring the loan), half the sum payable to the lender's agent for preparing the deeds. Where agent acts for both

borrower and lender, one-third of the fee *ad valorem* to be allowed in addition for procuring the loan, and meetings and arrangements with lender. For bonds of annuity, the price paid to be held as the amount of the security; and where no price paid, twenty times the amount of the annuity. "Bonds of Caution" are exclusive of bonds for the price under No. 7, but include deeds of arrangement in bankruptcy, and similar deeds. The sum charged on for such bonds and deeds not to exceed £5000.

15. Mortgages on ships.

Charge.—Sum under £500, £1s. 1s.; £500 and under £2000, £2, 2s.; for every additional £1000 or part of £1000, £1, 1s.; but not to exceed £10, 10s. To include fee for registering.

16. Bonds of corroboration.

Charge.—*One-third* fees of a bond, upon the sum in the bond of corroboration.

Pro. Rule.—To be drawn by agent of creditor, and paid for by debtor.

17. Discharges of bonds and dispositions in security, and of debts or obligations, and deeds of restriction.

Charge.—*One-fourth* fees of dispositions; but not to exceed £10, 10s. The amount discharged to be held as price.

Pro. Rule.—To be drawn by agent of debtor; whole expenses, including revising, to be paid by debtor.

Exception.—Discharge of a policy assigned or regarding which diligence has been used, to be drawn by Insurance Company's agent, and paid for by policy-holder.

18. Discharges of legacies, provisions, and residues, where special deed necessary.

Charge.—Same as No. 17.

Pro. Rule.—To be prepared by agent for the estate, and paid for by estate. Beneficiary to pay his own agent's revising fee.

VI.—FEES OF FAMILY SETTLEMENTS AND TRUST-DEEDS, &c.

19. Deeds of entail, trust-dispositions and settlements, testaments, deeds of assumption or resignation of trustees; trust-deeds for behoof of creditors; dispositions, assignations or other conveyances, where no price paid; and all deeds arising out of or connected with deeds of settlement or judicial trusts, and deeds conveying the property or residue in implement of such deeds—where the fees under No. 18 are not applicable.

Charge.—Regulation fees, where the value of the property does not exceed £1000. *Double* regulation fees where the value exceeds £1000 and does not exceed £2000. *Triple* regulation fees where it exceeds £2000 and does not exceed £10,000. *Quadruple* regulation fees where it exceeds £10,000.

Pro. Rule.—Conveyances and deeds in implement of trust deed, same as No. 18.

20. Marriage contracts.

Charge.—*One-half* fees of dispositions according to the total value of the jointure and property provided or secured to the wife or husband, or both ; or, in option of agent, *double* regulation fees. Jointures to be taken at twenty years' purchase.

Pro. Rule.—To be prepared by agent for the wife, and paid for by the husband.

VII.—FEES OF MISCELLANEOUS DEEDS.

21. Tacks.

(a) Minerals and Quarries.

Charge.—*One-third* fees of dispositions, calculating value at twenty years' purchase of fixed rent.

Pro. Rule.—To be prepared by agent for landlord. The whole expense, including revising and a tenant's copy where no duplicate, to be paid equally by the landlord and tenant.

(b) Other subjects.

Charge.—Rent not exceeding £100, £1, 1s.; £100 and under £200, £2, 2s.; £200 and under £500, £3, 3s. And for every additional £100, or part of £100, 5s. 3d.

22. Bills of Sale of Ships.

Charge.—Same as No. 15.

23. Contracts of Copartnery, and Articles and Memorandum of Association of Incorporated Companies.

Charge.—Defined or estimated stock—Under £500, £4, 4s.; £500 and under £1000, £5, 5s.; £1000 and under £2000, £6, 6s.; £2000 and under £4000, £7, 7s.; £4000 and under £6000, £8, 8s.; £6000 and under £8000, £9, 9s.; £8000 and under £10,000, £10, 10s.. And for every additional £1000, 10s. 6d. In every other case, *double* regulation fees. But in no case to exceed £210.

24. Contracts, Agreements, and Obligations of importance, not otherwise provided for.

Charge.—*One-fourth* fees of dispositions according to the amount or value of the transaction. Or, in agent's option, or where no amount is stated or ascertainable, *double* regulation fees.

Pro. Rule.—Contracts and agreements to be paid by parties equally. Deeds of obligation to be paid for by granter.

25. Presentations to Church Livings.

Charge.—Drawing the deed, and trouble in transmitting to presentee, or to the presbytery, &c., £5, 5s.

Pro. Rule.—To be prepared by agent for patron, and paid for by presentee.

26. Factories and Powers of Attorney.

(a) Where subject of Factory or Debt to be recovered does not exceed £500.

Charge.—Regulation fees.

61. Contracts for execution or maintenance of works.

Charge.—Same as No. 24.

Pro. Rule.—The company's agent draws the deed. The whole expense, including stamp-duty and revising fee, when deed revised by contractor's agent, to be paid by the parties equally.

XVII.—TAXATIONS.

62. Auditor's fees taxing accounts.

Charge.—Amount of accounts as submitted—Under £10, 2s. 6d.; £10, and under £20, 5s.; £20, and under £50, 7s. 6d.; £50, and under £75, 10s.; £75, and under £100, 15s.; £100, and under £150, £1, 1s.; £150, and under £200, £1, 11s. 6d.; £200, and under £300, £2, 2s.; £300, and under £400, £3, 3s.; £400, and under £500, £4, 4s.; £500, and under £600, £5, 5s.; £600 and above, £5, 5s. for the first £600, and 10s. 6d. per cent. for all above that sum.

GENERAL NOTES.

1. Meetings and correspondence relative to the preparation and execution of Deeds chargeable *ad valorem*, or more than single regulation fees, or to transactions for which a factor fee or commission is allowed, not to be charged.

2. A sheet consists of 250 words. Part of a sheet to be charged as a sheet.

3. Part of an hour to be charged as an hour.

4. Revising fees to be charged half the fees of drawing, except in cases otherwise specially provided for, and, except as aforesaid, to be paid to the agent by his own employer. Where an agent acts for more than one party to a transaction, he is not entitled to charge revising fees for deeds drawn by himself. Where a deed is revised by more than one agent, in respect of different interests, the revising *ad valorem* fee to be allowed only to the agent whose client has the principal interest—the other agents to be each allowed one-half drawing regulation fees.

5. In all cases it is optional to the agent to charge either the fees *ad valorem*, or regulation fees. The professional rules as to the party entitled to prepare deeds to be strictly adhered to.

6. The object of the preceding table is to regulate the rates of charge for the cases therein enumerated, where there is no special stipulation. While parties may make any arrangement between themselves relative to payment of expenses, which they consider more equitable or convenient in special circumstances, it is at the same time recommended that the professional rules be adhered to as far as possible.

7. On the subject of commissions, it has been found impossible

to lay down any general rule applicable to every case—all that can be done is to indicate rates which it is recommended should be adopted in ordinary circumstances. A commission is a remuneration for trouble and responsibility, and the rule, therefore, for regulating it should be the extent of that trouble and responsibility. But while it is impracticable to fix absolutely the rates of commission, it will not be difficult, with the aid of the above notes and the rules suggested, for parties, having due regard to circumstances, to fix fair rates in each particular case.

III.—MISCELLANEOUS.

I.—FORM OF CONTRACT OF INDENTURE BETWEEN A LAW AGENT AND AN APPRENTICE.(a)

It is CONTRACTED, AGREED, AND ENDED between A., Writer to the Signet (*or, as the case may be, (b) if by a company, say, between A. and D., Writers to the Signet, carrying on business under the firm of A. & D., Writers to the Signet*), of the first part, and B., son of E., with consent of the said E. (*c*) as cautioner, surety and taking burden on him for the said B., in manner here set forth, of the second part; That is to say, the said B., with consent of the said E., and they jointly and severally, bind and oblige themselves that the said B. shall serve the said A. (*or, in case of a company, the said A. & D. jointly, and the survivor of them solely*) (*d*) in his (*or their*) office and employment of writer (*or writers*) to Her Majesty's Signet, and all others his (*or their*) writings and employment, and that for the space of five (*or three*) (*e*) full and complete years, from and after the day of _____, which is hereby declared to be the date fixed for the commencement of the apprenticeship of the said

(a) As to the amount of stamp duty, see *ante*, p. 29; and as to recording and intimating, see *ante*, p. 30.

(b) The master must be a practising law agent, or a sheriff-clerk, who was in office on 5th August 1873. See *ante*, p. 27.

(c) See *ante*, p. 26.

(d) See *ante*, p. 27.

(e) See *ante*, p. 31, as to the cases in which service for three years is sufficient.

(g) The date fixed for the commencement of the apprenticeship should be stated; and it seems scarcely safe to fix it at any time prior to the execution of the indenture. See *ante*, p. 33.

B.,(g) and also, at the expiration of the said five (*or* three) years, for an additional period equal to the time during which the said B. shall have been absent from the service of the said A. (*or* A. & D.), in the event of such additional service being required, in order to qualify the said B. for admission as a law agent;(h) during which time *or* times the said B. and the said E., hereby bind and oblige themselves, jointly and severally, that the said B. shall serve the said A. (*or*, the said A. & D. jointly, and the survivor of them), in his (*or* their) office and employment foresaid, honestly, faithfully, and diligently, and at no time absent himself from the same without liberty asked and given, under pain of two days' service for each day's absence; and that he shall conceal and no ways reveal the secrets of his master's (*or* masters') business, *or* the business of his (*or* their) clients *or* employers, and shall behave himself decently, civilly, and discreetly, during his apprenticeship. For which causes, and in consideration of the sum of pounds sterling, instantly advanced and paid by the said B. to the said A. (*or*, to the said A. & D., *as the case may be*), in name of apprentice fee,(i) whereof the said A. (*or* A. & D.) hereby acknowledges (*or* acknowledge) the receipt, and discharges (*or* discharge) the said B., and all concerned thereof for ever; the said A. hereby binds and obliges himself (*or* the said A. & D. hereby bind and oblige themselves jointly and severally, and the survivor of them solely), to teach and instruct the said B., his (*or* their) apprentice, in all the parts of his (*or* their) said office and employment of writer (*or* writers) to Her Majesty's Signet, and all other his (*or* their) writings and employment, and to conceal no part thereof from him, but to do his (*or* their) utmost diligence to cause his (*or* their) said apprentice learn and conceive the same, so far as he knows himself (*or* they know themselves), and the said B. shall be capable to conceive and learn: And the said B. hereby binds and obliges himself to free and relieve the said E. of his foresaid cautionry and engagement for him, and of all damages and expenses which he may sustain *or* incur through the same: And both parties bind and oblige themselves to perform the premises to each other, under the penalty of £50 sterling, to be paid by the party failing to the party observing *or* willing to observe the same, over and above performance: And both parties consent to the registration hereof for preservation and execution. IN WITNESS WHEREOF, &c.

(h) See *ante*, pp. 29 and 36.

(i) The amount of the apprentice fee should be stated, although this does not seem to be absolutely indispensable. See *ante*, p. 376.

II.—REGULATIONS REGARDING APPLICANTS FOR INDENTURE, ADOPTED BY THE SOCIETY OF WRITERS TO THE SIGNET IN 1851.

1st, That the age for entering into Indenture shall not be under seventeen.

2nd, That Applicants for Indenture, who are not within the exceptions contained in Regulation III., shall, previous to entering into Indenture, have attended two full Winter Courses at one or other of the Universities in Scotland; or shall have given such attendance at one or other of the Universities or Colleges of England or Ireland, as shall appear to the Keeper and Commissioners of the Signet to be equivalent to the attendance required at the Scotch Universities; the Humanity, for one Session, in the case of attendance at a Scotch University, being one of the Classes of the above Courses, and that the other Classes shall be exclusive of those of Physic, Surgery, Divinity, and Law.

3d, That Applicants for Indenture may either have attended two Winter Courses at a University, in terms of the preceding Regulation, or they may produce evidence of having attended a full Course of Instruction at the High School of Edinburgh or the Edinburgh Academy; and, in addition to such evidence, a satisfactory Certificate of having attended one full Winter Course at one or more Classes, exclusive of Physic, Surgery, Divinity, and Law, at one or other of the Universities of Scotland; it being distinctly understood that by a *full Course* at either of the above-named Institutions, attendance during the full curriculum of study required at either is meant.

4th, That in the case of Applicants for Indenture not falling within the preceding Regulations, the Keeper and Commissioners of the Signet, on being satisfied that the Applicant has received a liberal education, equivalent to what is required from other Applicants under the preceding Regulations, shall have power to direct an Examination in writing as to his qualifications and acquirements; and, on receiving a report from the Examiners to be appointed by them in manner after-mentioned, and being satisfied therewith, shall also have power to allow such Applicant to enter into Indenture in the usual form.

5th, That the Keeper and Commissioners shall, at their Annual General Meeting in November, appoint five of their number, the Deputy-Keeper and Professor of Conveyancing being always two, and any three being a quorum, to conduct the Examination of the Applicants for Indenture referred to in the 4th regulation; with power to these Examiners to take such farther assistance in conducting the Examination as they may deem expedient.

The foregoing Regulations having been laid before the Keeper and Commissioners, they appointed a Committee for the purpose of carrying the 4th and 5th Regulations into effect; and the Committee, having obtained the assistance of Professor Kelland of the University of Edinburgh, and Mr Gordon, one of the Government Inspectors of Schools, adopted the following as the Course of Examination, to be followed under the 4th and 5th regulations.

I. That the Examination shall embrace the following subjects, viz. :—

1. English Literature, including Grammar and Composition.
2. Geography and History.
3. Latin.
4. Greek.
5. Arithmetic.
6. Mathematics.

II. That the Examination be conducted by two Assistant Examiners, under the superintendence and control of the Committee.

III. That along with the questions and the written answers of the Candidate, the Assistant Examiners shall report upon the knowledge and qualifications of the Candidate absolutely, and that they shall also report specially, whether the candidate is possessed of attainments equal to those which ought to be found in a person who has attended two full sessions at a Scottish University, or who has completed the entire curriculum of attendance at the High School or Edinburgh Academy.

For the information of Applicants, and as an interim scheme of examination, the following outline has been agreed on for the present,—viz. :

1. *English Literature, including Grammar and Composition*.:—The derivative sources of the English Language;—the great eras of its Literature from the Reformation downwards;—a knowledge of its Grammar, to be tested by a critical analysis of a passage.

2. *Geography and History*.:—The former will include a general view of the surface of the globe, regarded topographically, physically, and commercially; and a detailed knowledge of the British Empire.

The latter will comprise the great Empires and Governments of Antiquity, with the circumstances of their rise and fall;—Outline of Sacred History;—Revival of Learning;—the greater European Wars and Revolutions;—origin and progress of the Feudal System;—(*Whyte's or Tytler's Elements of History*; *Robertson's Introduction to the History of Charles the Fifth*);—Detailed History of the British Empire, more especially of events affecting its Constitution.

3. *Latin*.:—Mair's Introduction, or any similar work on the Syntax of the Language;—Translation, with grammatical analysis from any of the ordinary school or college class-books.

4. *Greek* :—Translation, with grammatical analysis, from the *first* Book of the Anabasis, and one of the Gospels;—any other book or books may be professed instead of these.

In the case of any candidate not professing Greek, the commissioners will be ready to consider his application to be examined in any modern language in lieu thereof.

5. *Arithmetic* :—The whole subject.

6. *Mathematics* :—First four and the sixth books of Euclid. A competent profession in Practical Mathematics may be accepted for the sixth and also for the fourth.

Algebra to quadratic equations.

REGULATIONS OF THE SOCIETY OF WRITERS TO THE SIGNET RELATIVE TO ENTRANTS.

1. That the endurance of the service, under indenture or certificate, shall be for a term of five years.

2. The fees payable on entering into indenture are as follows :—

To the Library and Society Funds,	£131	1	0
To the Widows' Fund,	50	0	1
Apprentice fee,	150	0	0
Stamp for indenture,	60	0	1
Fees payable at Signet Office for petition, &c.,	2	15	0
Recording indenture,	0	18	0

£394 14 2

3. On the expiration of the term of apprenticeship, the indenture must be discharged by the master, and the discharge recorded at the Signet Office within three months thereafter. Immediately on the discharge being recorded, application may be made by petition to the Keeper and Commissioners to have the applicant taken upon his private trials.

4. Previous to making such application, every candidate shall produce certificates of his having attended four courses of the law classes—viz., one of Civil Law, one of Scots Law, and one of Conveyancing, together with a certificate of his having attended a second course of any of them.

5. At the expiration of three months after the private trials, the applicant may be taken upon his public trials. The public trials must take place during the sitting of the Court.

6. Fees on passing private trial :—

Fee for recording discharge of indenture,	£0	18	0
Petition to pass,	0	18	0
Treasurer of the Society	60	0	0

Carry forward, £61 16 0

Brought forward,	£61	16	0
Fees on passing public trial :—			
Stamp for commission,	25	0	1
Fees payable at the Signet Office, and ac- counted for to Exchequer,	51	8	0
Macer's fees,	3	10	6
	£141	14	7

The above sums of £394, 14s. 2d. and £141, 14s. 7d. represent the total expense of becoming a member of the Society. The apprentice fee may either be paid or not, according to arrangement.

The sum of £60 above mentioned, as payable to the Society funds, must be paid for the private examination.

The annual contribution to the Widows' Fund is £6, 6s. 7d., and a yearly fee of 10s. 6d. is exigible for the book-carriers connected with the Library.

III. THIRTEENTH PERIODICAL EXAMINATION OF CLERKS AND APPRENTICES BY THE FACULTY OF PROCURATORS IN GLASGOW. —October 1872.

The Dean and Council of the Faculty of Procurators in Glasgow, in communicating to the clerks and apprentices of the legal profession in Glasgow the subjects for the thirteenth periodical examination, to take place in October or November next, have to add the following explanations :—

1. Intending competitors must give in their names to the Clerk of Faculty, in the annexed form, on or before Monday, 14th October next.
2. Written or printed questions calculated to elicit the extent of knowledge of the competitors will be laid before them on the day of examination, and six hours (from ten to four o'clock) will be allowed for answering the questions in writing.
3. Every competitor must be prepared to be examined in all the subjects of his class.
4. For the purpose of deciding the merits of the answers, each question will have affixed to it in the private copy of the Examiners a certain number, and the value of the answers will be fixed in relation to this standard, and the places of the competitors decided accordingly.
5. A prize will be given in each of the four classes to the competitor who obtains the highest number of marks; and certificates according to the degrees of merit will be granted to all the competitors.

FORM OF APPLICATION TO BE EXAMINED.

GLASGOW,

187 .

To the Clerk of the Faculty of Procurators,
Glasgow.

SIR,

Please insert my name in the List of Clerks and
Apprentices desirous to be examined at the Periodical
Examination of the Faculty, in Class .

I am, SIR,

Your obedient Servant,

SUBJECTS OF EXAMINATION.

I. *Clerks and Apprentices who have been so for not more than
Two Years.*

1. Writing to Dictation.
2. Arithmetic—Proportion, Interest, and Discount.
3. Execution and Attestation of Scotch and English Deeds and Instruments.
4. The Law of Obligations and Contracts, as explained in Erskine's Principles by Smith or Guthrie, Book III., Tit. 1 and 2.
5. Ramsay's Roman Antiquities, Chap. IX.

II. *Not exceeding Three Years.*

1. Arithmetic—Practice, Vulgar and Decimal Fractions, Calculation of Commission and Insurance.
2. The Laws of Bills of Exchange and Promissory Notes.
3. The Law of Succession to Heritable Property, as explained in Erskine's Institute, B. III., Tit. 8.
4. Lord Mackenzie's Roman Law:—Preliminary Chapter on Jurisprudence and the principal Divisions of Law.

III. *Not exceeding Four Years.*

1. Form of Process in Sheriff and Commissary Courts.
2. The Law of Succession in Moveables.
3. Menzies's Lectures:—Ante-nuptial Contract in relation to Moveable Property.
4. Bell's Principles:—Maritime Insurance.
5. Lord Mackenzie's Roman Law:—Historical Sketch of the Roman Law, Introductory Chapter and Parts II., III., and IV.

IV. *Exceeding Four Years.*

1. Law of Succession in Heritable Rights, and completing Titles.
2. The Contract of Affreightment.
3. The Constitution, Transmission and Extinction of Heritable Securities.
4. The Law of Sale, as explained in Bell's Principles.
5. Justinian's Institutes, Book III. Questions upon the whole Book, and Translation of one or two of the Titles.

IV.—FORM OF APPLICATION FOR CERTIFICATE
OR LICENSE TO PRACTISE.

WRITERS TO THE SIGNETS', AGENTS', ATTORNEYS', SOLICITORS', AND NOTARIES' TICKET.

(To be filled with one name only.) For the Year 187 -7 .

<p>State the NAME and DESIGNATION of the Person for whom the Certificate is required.</p>	<p>PLACE of BUSINESS of such Person, and if removed since last Certificate, state also such removal.</p>	<p>IN WHAT COURT ADMITTED. If the Certificate applied for is for a Person who has not been admitted Three Years, state the date of his first admission.</p>	<p>If in PARTNERSHIP state Title of Firm, and insert the Names of the Partners.</p>

V.—FORM OF APPLICATION, under Act of Sederunt
6th February 1806, to have account taxed, and de-
cree for the amount pronounced against client.

— DIVISION. [If presented to a Lord Ordi-
(Date.) nary, add here LORD —,
PETITION, A— B—, W.S., ORDINARY.]
(For remit to Auditor, &c.)

PARTY, Agent.
Mr —, Clerk.

UNTO THE RIGHT HONOURABLE
THE LORDS OF COUNCIL AND SESSION,

THE
PETITION
OF

A— B—, WRITER TO THE SIGNET, EDINBURGH ;

Humbly Sheweth,—

THAT in the year — the petitioner was employed by C. D.,
merchant in Glasgow, to (*specify the nature of the proceedings*
in the Court of Session).

That in the course of the said proceedings the said C. D. in-
curred to the petitioner a business account, commencing on —,
and ending on —, amounting to £—. The said account was
rendered to the respondent on —.

That the said account, a copy of which is herewith produced, is
resting owing to the petitioner, who is desirous to have the same
taxed, and decree pronounced for the taxed amount, with interest
from the — day of — till payment ;(a) and he accordingly makes
the present application to your Lordships, in terms of the Act of
Sederunt of 6th February 1806.

May it therefore please your Lordships to grant warrant for
serving this application, and the deliverance to follow
hereon, on the said C. D., and to remit the said account
of expenses to the Auditor of Court to tax the same and
to report ; and thereafter, upon advising the report of the
Auditor, to find the said C. D. (*if the application is directed*
against more than one party, add after their names con-
jointly and severally) liable to the petitioner in the taxed
amount thereof, with interest from the — day of —,

(a) Generally twelve months after the date of the last item ; see *ante*,
p. 138.

as above specified, until payment, and to decern against the said C. D. therefor; and farther to find him liable in the expense of this application and of the procedure to follow hereon; or to do otherwise in the premises as to your Lordships may seem proper.

According to Justice, &c.

(Signed by Counsel.)

VI.—ACT OF SEDERUNT, passed on 21st December 1833, for enforcing the Acts of Sederunt, 11th March 1772, and 13th February 1787, and other existing Regulations relative to Agents and Practitioners before the Court of Session; and making farther Regulations for more effectually checking certain irregularities and abuses in the conducting of the Business of the Court.

The Lords of Council and Session having taken into their consideration the necessity of enforcing the Regulations applicable to the management and agenting of causes before this Court, and of making farther regulations for the reasons hereinafter expressed, and farther considering, that—

Whereas, by sundry regulations of Court, and particularly by the Act of Sederunt, dated 11th March 1772, it is provided that no person, except Clerks to his Majesty's Signet, First Clerks to Advocates, and Agents or Solicitors duly admitted in terms of said Act, and of the Act of Sederunt, 10th August 1754, shall be entitled to act as agents or solicitors in this Court:—

And whereas, by an Act of Parliament, 1 Will. IV., c. 69 (dated 23d July 1830), it is enacted, § 28, "That it shall and may be lawful for all persons entitled, *before the passing of this Act*, to conduct causes as procurators before the High Court of Admiralty in Scotland, and all such persons are hereby authorised, *during their respective lives*, to conduct as agents before the Court of Session all or any causes and proceedings whatsoever, which are or may be competently heard and determined in that Court." And by sec. 39, it is also enacted: "That it shall and may be lawful for the Incorporated Solicitors practising before the Consistorial Court of Edinburgh *previous to the passing of this Act*, and they and each of them are, and is hereby, authorised and empowered, *during their respective lives*, to conduct as agent or agents before the Court of Session, all or any causes or proceedings, *such as have heretofore been carried on before the Court of the Commissaries of Edinburgh*, which may hereafter be proceeded in, heard, or determined before the Court of Session."

And whereas it has from time to time been found necessary to pass regulations, in order to prevent unqualified persons from practis-

ing as agents or solicitors in the Court of Session, notwithstanding whereof several individuals have of late taken upon themselves to do so :

Therefore, and for the prevention of all such abuses in future, the Lords do hereby enact and ordain : That there shall, on or before the 1st day of February next, and annually on or before the 5th day of December in each year thereafter, be delivered at each of the offices of the Principal and Depute-Clerks of Court, and at the Bill Chamber, and to each of the Keepers of the Rolls of the respective Divisions of the Inner House, for the use of the Court—

1st. A copy of the list now in use to be printed of the Society of Writers to the Signet.

2d. A list of the Incorporated Society of Solicitors before the Supreme Courts certified by their Secretary for the time.

3d. A list of Advocates' First Clerks entitled to practise as agents, —specifying after the name of each individual the name of the advocate whose certificate he holds, in terms of the Act of Sederunt 11th March 1772; said list to be certified by the Keeper of the Record or Roll of Practising Clerks kept by the Faculty of Advocates.

4th. A list of all persons who were entitled, as on the 23d day of July 1830, to conduct causes as procurators before the High Court of Admiralty, and who may be still alive.

6th. A list of the Incorporated Solicitors before the Consistorial Court of Edinburgh, as at the said 23d day of July 1830, who may be still alive, and who are entitled to act as agents in Consistorial Causes before the Court of Session. The said two last-mentioned Lists (4 and 5) to be certified by the clerk or secretary to those two bodies respectively for the time, and to specify also such of the members thereof as may belong also to the Society of Writers to the Signet, the Incorporated Solicitors before the Supreme Courts,—or the body of Advocates' First Clerks—entitled as such to practise as agents or solicitors in the Court of Session.

That the five several lists above mentioned shall also be authenticated by the signature of the presiding officer of the respective bodies for the time.

Farther, considering that instances have of late occurred where individuals who were not entitled to practise in this Court or in the Bill Chamber, either from not having been duly admitted as agents or solicitors, or from not having been practitioners before the High Court of Admiralty or the Consistorial Court at Edinburgh, as at 23d July 1830, or from having failed or neglected to purchase attorney licenses in terms of law,—have presumed to conduct business for their own behoof and advantage in the names of agents or solicitors who were duly qualified to practise,—the Lords do hereby declare that they will visit all such practices in future with the severest penalties and most rigorous punishment; and that if any writer, solicitor, or agent shall presume either to authorise or permit his name to be used by any unqualified person or persons as above specified, he shall be furthwith dealt with as guilty of a contempt of

Court; and on the fact being established, shall be suspended from the rights and privileges of an agent or solicitor for such period as the Court may think proper, not exceeding one year from the date of conviction.

And farther, the more effectually to check and put a stop to such abuses, it is hereby enacted: That no person shall be entitled to borrow up processes or papers, either at the offices of the clerks of Court or at the Bill Chamber, except those who are legally entitled to act as agents or solicitors in this Court, their clerks and apprentices; nor shall the clerks of Court or of the Bill Chamber lend papers or processes to any other: And that it may be known who are really and *bona fide* their clerks and apprentices, each person entitled to act as agent or solicitor shall immediately after the passing of this Act, give in to each of the Clerk's offices and to the Bill Chamber a signed list of the names of those who are his clerks and apprentices, and for whom he shall be answerable; and when any of those contained in the list shall leave his service, he shall, within three days at farthest thereafter, notify the same at each of the Clerk's offices and at the Bill Chamber, that his name may be expunged from the list.

And the Lords appoint this Act of Sederunt to be engrossed in the Sederunt-Book, and printed and published.

(Signed) C. HOPE, *I.P.D.*

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